United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,986

885

MOHAWK AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent

Petition for Review of Order of the
Civil Aeronautics Board

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,986

MOHAWK AIRLINES, INC.,

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v.

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JOINT APPENDIX

INDEX

[Filed CAB - Aug. 7, 1953]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

In the Matter of Compensation for transportation of mail by aircraft with facilities used and useful therefor and the services connected therewith of MOHAWK AIRLINES, INC.	DOCKET NO. 6255

[2]

PETITION CHALLENGING FINAL MAIL RATE AND FOR A NEW FINAL MAIL RATE FOR TRANSPORTATION OF MAIL BY AIRCRAFT OVER A. M. 94

Mohawk Airlines, Inc. (Mohawk), the holder of a temporary certificate of public convenience and necessity for Route No. 94 hereby petitions the Civil Aeronautics Board, challenging the existing rate and for a new final mail rate of compensation for the transportation of mail over Route No. 94 and in support thereof respectfully alleges as follows:

1. That Mohawk's mail rate has been in effect since the 18th day of February 1952, or for approximately 18 months; that since February 18, 1952, the character and volume of Mohawk's service has substantially changed and increased; that the cost of operating DC-3 aircraft in scheduled short haul transportation of persons, property and mail has substantially and steadily increased; and that Mohawk has, to a major degree, added to its investment in flight equipment, hangar and plant facilities used and useful for the transportation of mail and for the development of the commerce of the

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[3]

United States, the Postal Service and the national defense.

2. Order Serial No. E-6623 fixed the final mail rate for Mohawk as of February 18, 1952. Subsequent to this date and by Order Serial No. 6541, dated June 24, 1952, Mohawk's temporary certificate of public convenience and necessity for the transportation of persons, property and mail over A. M. 94 was renewed for a seven-year period (from June 28, 1951 through June of 1958). Acting on its application duly heard in the certificate renewal proceeding, certain Mohawk routes then being operated by virtue of exemption authority and/or change of service pattern authorization were certificated to Mohawk and added to A.M. 94 and a new and additional route extension of 68 miles in length was added providing service to Watertown, New York.

By Order Serial No. E-7294, dated April 10, 1953, Mohawk's certificate was further extended from the intermediate point Elmira/ Corning, New York to Bradford, Pennsylvania, a distance of 94 miles.

By Board Order Serial No. E-7534, dated July 3, 1953, A. M. 94 was extended from the terminal point Albany, New York through intermediate points to Boston, Massachusetts, a distance of 157 miles, such extension being designated as Segment 5 of A. M. 94.

All of the above mileage so authorized is today

[4]

being operated. Owing to the new services provided by Mohawk since February 18, 1952, the development of new routes, and the general increased passenger demand for Mohawk service, a substantial increase in the number of revenue plane miles flown over and above that forecast for the annual period commencing February 18, 1952, has been experienced. In the annual period commencing August 1, 1953, a further substantial increase in mileage flown will be necessary for Mohawk so as to meet all of the requirements of the Civil Aeronautics Act. The forecast mileage for the annual period commencing February 18 was

1,842,961. In the twelve months ending June 30, 1953, Mohawk flew 2,362,986 revenue plane miles, an increase of 28.2% above that provided for in its final mail rate. For the twelve months period commencing August 1, 1953, Mohawk forecasts additional increases as mentioned above which will result in the operation of 2,903,100 revenue plane miles, a further increase of 36.5%. The increase of better than one-half million miles during the twelve months ended June 30, 1953 has been accomplished by Mohawk without a change in its mail rate and at a substantial saving of public funds in that financial return on Mohawk's investment has been substantially non-existent.

3. During the period of the last several years there has been a constant rise in the cost of providing scheduled short haul service with DC-3 aircraft by the local service industry. In the SUPPLEMENTAL OPINION AND

ORDER in the matter of the Pioneer Air Lines mail rate case, Docket No. 5499, the Board specifically recognized the cost increase trend stating that increases in expenses of 11.72% over the base year ending March 31, 1952 "falls within the range of the cost trend experienced by other comparable carriers." The costs of Mohawk's service have likewise increased in the neighborhood of 12% over the base period ending February 18, 1952.

4. As mentioned above, Mohawk has made substantial additional capital investment in plant facilities and flight equipment currently not included in its investment base for rate making purposes. Three additional DC-3 aircraft not previously included in the investment base have been purchased and are used and useful for the operation of A. M. 94. Improvements totaling in excess of $200,000 have been made as additions to hangar, plant and office facilities at Ithaca, New York. In addition, substantial capital investment has been made in Extension and Development costs in Dockets 4947 et al.,5055 et al., and 5053 et al., the

[5]

renewal with extensions of the Mohawk certificate, the extension to Boston, and the extension to Bradford, respectively.

5. In spite of the additional mileage, increased costs of operation and increased investment, Mohawk's mail pay need from the commencement of certificated service in September of 1948 through June of 1953 has shown a substantial and continuing decrease in relation to commercial revenues. Load factors and passenger yield per passenger mile continue to remain at or near the top of the entire local service industry.

[6]

6 Mohawk therefore alleges that because of continued growth in its operations and investment and the rising cost level its final mail rate established in Order Serial No. E-6623 is not a fair and reasonable rate for the future; that a break even need of $1,287,800 per annum before taxes and return on investment, resulting in a break even need of 44.2¢ per plane mile, is a reasonable rate.

7. Mohawk has served a copy of this Petition on the Postmaster General by sending the same to him by registered mail, postpaid, prior to the filing of the Petition with the Board.

WHEREFORE, Mohawk Airlines, Inc. respectfully requests that the Board by virtue of its authority under Section 406 of the Civil Aeronautics Act of 1938, as amended, establish a final mail rate effective August 7, 1953, so as to meet the estimated break even mail pay need of $1,287,800 per annum plus proper allowance for taxes and a reasonable return on its investment used and useful for the transportation of mail over Route No. 94; and for such other and further relief as to the Board may seem proper.

Respectfully submitted,

MOHAWK AIRLINES, INC.

/s/ John R. Carver, Vice President

/s/ Carl A. Benscoter, Vice Pres.-Operations

/s/ H. Stuart Goldsmith, Ass't, Treasurer

[Received CAB - Aug. 7, 1953]

SCHEDULE A
DOCKET NO. 6255
Page 1 of 1

MOHAWK AIRLINES, INC.

STATISTICAL RESULTS OF PAST PERIODS AND FORECAST COMMENCING AUGUST 1, 1953

	ACTUAL 12 MONTHS ENDED JUNE 30, 1953	ACTUAL 6 MONTHS ENDED JUNE 30, 1953	FORECAST COMMENCING AUGUST 1, 1953
SCHEDULED MILES	2,291,723	1,145,242	2,948,791
PERFORMANCE FACTOR	95.64	94.30	95.47
SCHEDULED MILES FLOWN	2,191,893	1,079,964	2,815,100
EXTRA SECTION MILES FLOWN	59,154	32,931	59,000
NON-SCHEDULED MILES FLOWN	111,934	11,088	29,000
TOTAL REVENUE MILES FLOWN	2,362,986	1,123,983	2,903,100
AVAILABLE SEAT MILES - SCHEDULED SERVICE (21-Seat Basis)	47,271,987	23,370,795	60,356,100
REVENUE PASSENGER MILES - SCHEDULED SERVICE	22,865,077	11,729,165	29,318,440
PASSENGER LOAD FACTOR - SCHEDULED SERVICE	48.37	50.19	48.5757
YIELD PER PASSENGER PER PASSENGER MILE - SCHEDULED SERVICE	$ .067898	$ .070203	$ .06875

[8]

[8]

[9]

[9]

MOHAWK AIRLINES, INC.
EXPLANATORY NOTES TO
SCHEDULE A

Mileage:

The scheduled miles are based on the flight schedule effective August 1, 1953 when service was inaugurated over Segment 5. A minor modification occurs on September 9. Schedules are increased 10% as of September 27. 50% of this increase will result from an additional round trip between Ithaca and New York City via Elmira and Binghamton. The balance will result from either increase in published schedules or by way of extra sections during October.

November schedules revert to the basic September pattern and mileage with the cut-back coming in mid-November. Winter schedules will be effective in the months of December, January, February and March and call for the reduction of service by one round trip Ithaca-New York/Newark, Buffalo-Albany, and Watertown-New York/Newark. A fourth round trip Buffalo to Boston is added April 1 and in May all schedules terminated as of December 1 are reinstated. This schedule then carries through July of 1954.

Performance Factor:

The performance factor 95.47% represents the actual results of the past 12 months period as Mohawk believes this record to be typical of a future year's operation.

[10]

Scheduled Miles Flown:

Scheduled miles flown represents schedules miles times performance factor and excludes extra section miles.

Extra Section Miles Flown:

and

Non-Schedules Miles Flown:

See discussion of Schedule B with regard to use of aircraft for other than scheduled purposes.

Total Revenue Miles Flown:

These totals represent all revenue miles flown including extra section and non-scheduled miles.

Revenue Passenger Miles Scheduled Service:

Forecast of revenue passenger miles to be experienced in the annual period commencing August 1, 1953 is derived from the basic forecast load factor.

Passenger Load Factor - Scheduled Service:

The forecast load factor of 48.5757% is based on considered forecasts over Mohawk's route pattern as operated during the

[11]

past twelve months and as affected by additional services to be rendered in the year commencing August 1, 1953. A minor dilution results from new service over Segment 5 to Boston, new service over Segment 3 to Bradford, Pennsylvania and trends apparent in traffic over the pattern as flown during the past twelve months.

Yield per Passenger per Passenger Mile:

See discussion of passenger revenue in notes to Schedule B.

[17]

MOHAWK AIRLINES, INC.

EXPLANATORY NOTES TO

SCHEDULE B

The balance is made up by insurance, travel, stationery, and indirect payroll cost increases. The rate extended is 9.71¢. This rate is substantially below any recent past period.

[17]

Depreciation - Ground Equipment:

Depreciation of ground equipment will be $49,300 in the forecast year, a rate of 1.70¢.

NON-MAIL REVENUES

Passenger Revenue:

Total revenue passenger miles for the annual period have been computed from the forecast load factor of 48.5757 on a 21-seat basis or a total of 29,318,440 revenue passenger miles.

Passenger yield per passenger mile has been forecast to be 6.875¢, the highest in the scheduled industry. This yield is based on the experience over the Mohawk system since November of 1952 when the New York terminal was moved to Newark, New Jersey, which substantially increased the yield per passenger per passenger mile. The yield since returning to Newark is 6.90¢. New services added, to Bradford, Pennsylvania, and Boston, Massachusetts, will, because of the fare

[18]

structure existing over those portions of the Mohawk system, produce a yield of 6.35¢. The weighted average for the ensuing year is 6.8750¢.

The yield multiplied to forecast passenger miles will produce passenger revenues of $2,015,643 or 69.43¢ per plane mile.

Express and Freight Revenue:

Express and freight revenues are extended based on past experience and considering the new areas of service at 1.4¢ and 1.21¢ per mile respectively. Dollar revenues abount to $40,600 and $35,000.

Non-scheduled Transport Revenue:

Non-scheduled transport revenue is derived from a forecast 22,656 miles of non-scheduled service at a gross revenue of 64¢ per plane mile, resulting in dollar revenues of $14,500. In past periods, Mohawk's non-scheduled revenues and mileage have been considerably in excess of that forecast for the future. In September 1951, Mohawk purchased three aircraft which have been used extensively since that

date in non-scheduled service, including so-called Civil Air Movements. Only one of these three aircraft was allowed in the investment base as being used and useful for the certificated service authorized to the carrier at the time of the previous final mail rate conference. Increased demand for these aircraft for scheduled service over A.M. 94

[19]

has caused a continuing decline in the amount of non-scheduled service experienced. The additional schedules necessitated by recent route expansions require ten DC-3 type aircraft in scheduled service. Average annual utilization of approximately 6 hours and 30 minutes per day on ten aircraft will result.

More than one aircraft will be effectively out of service at all times undergoing phase overhaul, with another doubling as the operational spare and extra-section aircraft. (Extra sections forecast at 5,000 miles monthly).

Incidental Revenue:

Incidental revenues, while having been substantial in past periods, due to the inclusion therein of the revenue derived from Civil Air Movements, are no longer a substantial amount. Mohawk has not participated in CAM's in many months and does not anticipate doing so in the future, because of the light demand for DC-3 aircraft for such type of work and the unavailability of aircraft of Mohawk. Two more substantial non-repetitive contracts, whereby Mohawk leased its Beechcraft Bonanza for a period and leased a DC-3 prior to overhaul for use in a motion picture, resulted in revenues of $9,000 in this account during the first half of 1953. In the future, no such revenues are anticipated. The forecast is $5800 for the annual period commencing August 1, 1953.

E-8163

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Served: Mar. 12, 1954

DOCKET NO. 6255

MOHAWK AIRLINES, INC.

MAIL RATES

Adopted: March 12, 1954

STATEMENT OF PROVISIONAL FINDINGS AND CONCLUSIONS[1/]

BY THE BOARD:

This proceeding was commenced by petition filed by Mohawk Airlines, Inc. (Mohawk) on August 7, 1953, for an order fixing and determining new final rates of compensation for the transportation of mail over its entire system effective as of the petition date. Prior to this date, Mohawk was receiving mail pay pursuant to the final rate established by Order No. E-6623, dated July 22, 1952.

Subsequent to the establishment of the carrier's previous final rate, it inaugurated service between Utica, N.Y. and Watertown, N.Y.,[2/] Elmira, N.Y. and Bradford, Pa.,[2A/] and Albany, N.Y. and Boston, Mass., via

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1/ This statement does not necessarily represent the views of all members of the Board with respect to all issues.

2/ Robinson Airlines Corporation, Certificate Renewal Case, Docket No. 4947, Order No. E-6541, June 24, 1952.

2A/ All American Certificate Renewal Case, Docket No. 5053 et al., Order No. E-7294, dated April 10, 1953.

Pittsfield, Springfield-Westfield, and Worcester, Mass.,[3/] pursuant to modifications of its certificate of public convenience and necessity.

MAIL PAY REQUIREMENTS

Informal mail rate conferences were held pursuant to Rules 311-321 of the Rules of Practice, to develop the factual bases for determining the carrier's mail pay requirements.

The Board has reviewed in detail the forecast submitted by Mohawk together with the carrier's financial results as reflected on its Form 41 reports; and after full consideration thereof, giving due regard to current trends in traffic, revenues and expenses, has tentatively determined the fair and reasonable mail pay requirements for Mohawk for the future year beginning August 7, 1953, to be as follows:

	Amount	Cents per Revenue Mile
Break-even need	$ 981,553	36.31
Return on investment	105,994	3.92
Income tax	79,023	2.92
Total Mail Pay	$1,166,570	43.15

Concurrently, the Board is issuing an order directing Mohawk to show cause why the foregoing should not be established as the final mail rate in this proceeding.

The bases for the foregoing determination are set forth in detail in the Appendixes to this Statement. The factors upon which our findings and conclusions are predicated are discussed in the following sections of this Statement.

3/ Wiggins Renewal Investigation Case, Docket No. 5055 et al., Order No. E-6904, dated October 21, 1952.

Scheduled Services and Traffic

The carrier proposed to schedule 3,002,075 plane miles annually

and estimated that it will complete 2,846,267 miles based upon a performance factor of 94.81 percent.

We have determined that the reasonable mileage to be underwritten with mail pay consists of 2,703,445 plane miles, based upon scheduled mileage of 2,821,968 miles and a performance factor of 95.80 percent. As shown in Appendix No. 1, our finding is based upon the miles flown during the base year, the 12 months ended July 31, 1953, with an allowance for additional miles over the following segments: (1) Newark-Utica-Watertown; (2) Albany-Boston; and (3) Elmira-Bradford.

(1) Newark-Utica-Watertown. During the past year, the carrier achieved a load factor of approximately 56 percent on this segment, operating an average of slightly over three daily round trips. The carrier proposes to increase its frequencies by approximately 40 percent to nearly five daily round trips, and forecasts that this level of operation will achieve the same load factors as those experienced in the base year. While the experience on this segment supports some increase in schedules, we would not feel justified in underwriting an amount of additional mileage which can be operated only by the sacrifice of improved load factors. Accordingly, we will recognize a somewhat smaller increase in capacity than that proposed by the carrier; as follows: (a) On the Utica-Newark leg, which achieved a load factor of 66 percent during the past period, we have provided for four daily round trips, which is equal to the capacity scheduled during the carrier's peak month in the base period,

[42]

and (b) on the short stub-end Utica-Watertown leg, we have recognized three daily round trips despite the low experienced load factor of 28 percent. The provision for schedules in addition to a minimum service pattern on this latter leg is based upon (1) the operational difficulties which would result from a lower level of frequencies, and (2) the necessity of preserving the integration of traffic between this leg and the dense high yield Newark-Utica portion of the segment.

(2) Albany-Boston. Mohawk inaugurated service on this segment in August, 1953 with three daily round trips. During the first three months of operation the service has achieved a passenger load factor of 41 percent. The carrier has proposed a seasonal step-up to four daily round trips, and forecasts a 43 percent passenger load factor, which is slightly in excess of that required to meet direct operating costs. Considering the recency of inauguration of service and the load factors achieved, we do not believe that the operation of more than three round trips should be recognized at this time.

(3) Elmira-Bradford. In view of the low load factor of 10 percent experienced to date on this segment, we have accepted the carrier's forecast of one daily round trip.

Mohawk has forecast that it will experience 29,318,000 passenger miles in the future year. On the basis of the carrier's forecast of scheduled mileage, this would produce an estimated revenue passenger load factor of 49.05 percent, compared with 49.26 percent achieved in the base year. In view of the growth potential of the carrier's routes, it is believed that the passenger miles forecast by the carrier, which are accepted as

reasonable, can be achieved by the operation of the scheduled miles provided for herein at a resultant load factor of 51.64 percent.

After consideration of the schedule pattern forecast by Mohawk in relation to the anticipated volume of traffic, the Board finds that the schedules as adjusted in Appendix No. 1 are reasonable and should be recognized for mail rate purposes in the interest of one or more objectives of the Act.

Equipment

The carrier intends to operate 10 DC-3 aircraft in the future year. Based on the recognized scheduled miles to be flown, the volume of traffic projected, and the requirements of a reasonable scheduling

[43]

pattern, it is our conclusion that the operation of 10 aircraft, attaining an average daily utilization of approximately 6 hours, is reasonable.

BREAK-EVEN NEED

General

The determination of break-even need for the future year may be summarized as follows:

	Amount	Cents per Revenue Mile
Nonmail revenues	$2,102,423	77.77
Operating expenses	3,070,120	113.56
Nonoperating expenses	13,856	.52
Total expenses	$3,083,976	114.08
Break-even need	$ 981,553	36.31

[44]

Nonmail Revenues

The recognized nonmail revenues of $2,102,423, equivalent to 77.77 cents per revenue plane mile, represent an increase of $48,685 over the amount forecast by Mohawk. This increase is accounted for primarily by the application of a passenger yield of 6.818 cents rather than the estimate of 6.65 cents submitted by the carrier. The yield of 6.818 cents represents the carrier's experience in the base year ended June 30, 1953.

Operating Expenses

Mohawk has forecast operating expenses of $3,341,622, equivalent to 117.40 cents per revenue plane mile. We have recognized operating expenses in the amount of $3,070,120 equivalent to 113.56 cents per revenue plane mile, which is $271,502 less than that forecast by the carrier. The details of the adjustments to the carrier's forecast are set forth in Appendix No. 1. The major categories of adjustment are summarized below.

Flying Operations

The adjustment of $102,612 to the carrier's forecast of flying operations expense results from: (1) the use of the year ending June 30, 1953, rather than the first six months of 1953, as the base period, in order to avoid seasonal distortion; (2) disallowance of a portion of the claimed cost increases resulting from the shorter length of hop on the new Albany-Boston operation; (3) disallowance of longevity wage and salary increases, discussed below; and (4) the lower level of mileage recognized by the Board, referred to earlier in this Statement.

Maintenance Expense

The carrier has forecast maintenance expense at the rate of $34.35 per hour compared to the level of $31.10 experienced during the year

[45]

ended June 30, 1953. Both the forecast and the experienced levels exceed the standard of $30 per hour which the Board has applied in recent cases involving local service airlines.[4/] In support of its claim for an additional allowance for maintenance expense, the carrier has pointed to: (1) The additional labor cost involved in the carrier's phase overhaul program, which it is claimed enables the carrier to fly all aircraft on weekends, when its traffic is heaviest; (2) alleged difficulties in obtaining CAA approval for longer overhaul periods and for certain maintenance and inspection procedures which would reduce maintenance costs; (3) the fact that the engine overhaul cost of certain other carriers is low because of their use of surplus engines; and (4) the necessity of renting a heated hangar at Watertown. Some of these problems appear to be within the carrier's control. Others are by no means peculiar to Mohawk but have been shared by many, if not most, of the other local service operators. Moreover, other factors, such as Mohawk's

4/ North Central Airlines, Inc., Mail Rates, Docket No. 4999, Order No. E-7491, dated June 18, 1953, and Order No. E-7636, dated August 17, 1953. In Bonanza Airlines, Inc., Mail Rates, Docket No. 6108, Order No. E-7783, adopted Oct. 2, 1953, we provided an allowance of $30.50 per hour "solely because of the peculiar elements detailed in the last two rate orders for Bonanza" [Order No. E-6264, March 28, 1952 and Order No. E-6829, September 25, 1952] and we noted that this allowance "is not, of course, to be construed as establishing a level for other operators of DC-3 aircraft whose situation is not on all fours with that of this carrier." (Provisional Statement, Order No. E-7725, September 16, 1953, page 6). The standard of $25 per hour has been established for DC-3 maintenance expense for trunkline carriers. Colonial Airlines, Inc., Domestic System, Mail Rates, Docket No. 5497, Order No. E-6999, December 2, 1952; Northeast Airlines, Inc., Mail Rates, Docket Nos. 1932 and 1890, Order No. E-7443, June 5, 1953.

[46]

ownership of its maintenance facilities, its compact route structure, and the number of years it has been operating DC-3 equipment, should tend to offset those unfavorable factors which are beyond the carrier's control. In the absence of a convincing showing by the carrier that it is entitled to special treatment, we have adhered to the ceiling of $30 per hour for maintenance expense.

The present high level of maintenance expense experienced by Mohawk and many other local service carriers is a matter of grave concern to the Board. The experience of certain local service and small trunk-line carriers indicates that the maintenance of DC-3 aircraft should soon be performed, under efficient and economical managements, at a cost below $30 an hour. We are hopeful that aggressive action by the management of the airlines concerned, individually, and on a co-operative basis, will result in the control and reduction of these costs.

Longevity Pay Increases

The carrier claims an allowance of $26,700 for automatic longevity wage and salary increases which will become effective in the future year, urging us to abandon our long established policy of not recognizing such items in setting mail rates for future periods.5/

The carrier argues that automatic longevity pay increases can be estimated with reasonable accuracy. Moreover, it urges that in certain employee groups, such as flight captains, additional tenure does not

5/ Pioneer Air Lines, Inc., Mail Rates, Docket No. 5499, Order No. E-7225, March 13, 1953, and Order No. E-7473, June 12, 1953; Mid-Continent Airlines, Inc., Mail Rates, Docket Nos. 4680 and 5075, Order No. E-6625, July 23, 1952; Continental Air Lines, Inc., Mail Rates, Docket No. 5145, Order No. E-5973, December 27, 1951; Pioneer Air Lines, Inc., Mail Rates, 12 C.A.B. 84 (1950).

necessarily result in greater efficiency and productivity which could be offset against the pay increases. With respect to other employee groups, the carrier contends that its forecast reflects increased efficiency in that it does not provide for increases in personnel despite its forecast of a greater volume of traffic.

After careful review of these and related considerations, it is our conclusion that adequate reason does not exist for departing from our established policy as regards non-recognition in future rates of longevity increases. In fixing rates for past, as distinguished from future, periods we do not disallow increases of this nature as such. In such cases, the reported results for past periods necessarily reflect all economies and efficiencies resulting from managerial efforts, the increased experience of other personnel and the incentive provided by so-called "step-increases" in wages and salaries.6/ However, in setting a rate for a future period we are faced with the fact that efficiencies and economies resulting from factors such as the foregoing are not capable of being translated into dollar amounts with any reasonable degree of accuracy and, accordingly, are normally not reflected in specific dollar amounts, as such, in the determination of the rate. Were we to attempt to speculate, we might conclude that such efficiencies and economies would outweigh the increased wages and salaries, although the carrier argues the contrary. In any event, we have found no sound basis for

concluding that the improvements in the operation as a whole will exceed in dollar value the costs of such increases nor can we conclude that they will be less in dollar value than such increases. Accordingly, we are of the opinion that a fair

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6/ Likewise, since a rate for the future period is based upon the experienced results during the base year, the cumulative effect of all past longevity increases along with all economies and efficiencies achieved by the carrier is reflected in such rate.

[48]

balance between future cost increases, on the one hand, and attainable cost savings, on the other, can best be achieved by adhering to our established policies concerning recognition of expense levels for future periods.

Non-operating income and expense

As indicated in Appendix No. 1, we have provided for the amortization of extension and development and preoperating expense recognizable for rate purposes in accordance with established policy.

EARNINGS ELEMENT AND PROVISION FOR INCOME TAXES

Included in the mail compensation for the future year is an earnings element of $105,994 and provision for income taxes of $79,023. The allowance for the earnings element is based upon an eight percent rate of return on the recognized investment of 1,324,927 as set forth in Appendix No. 2. The provision for federal income taxes reflects the reduction, effective April 1, 1954, of the tax rate to 47 percent, as provided by existing tax law.

SUBSIDY SEPARATION

The sum of the break-even need, earnings element and tax allowance is $1,166,570.

Pursuant to Reorganization Plan No. 10 of 1953, effective October 1 1953, for mail services performed on and after that date, service mail pay is to be paid by the Postmaster General at service mail rates established by the Board, and the remainder of the total mail payments to the

carriers is to be paid by the Board. The mail rate for Mohawk for the carriage of air mail (including air parcel post), established by Order No. E-7721, fixing service mail rates pursuant to Reorganization Plan No. 10, of 91 cents per mail ton-mile produces service mail pay of $31,850 for the estimated 35,000 mail ton-miles to be performed in the future year.

In addition, the Board has established a rate of 30 cents per mail ton-mile for the carriage by Mohawk of preferential mail and other classes of mail (other than air mail and air parcel post).[7/] At present, since complete data are not yet available, we are unable to estimate the service mail pay which Mohawk will earn for transporting classes of mail other than air mail. Accordingly, without reflecting such compensation, after deducting the estimated service mail pay for the carriage of air mail (including air parcel post) of $31,850 from the total annual mail pay of $1,166,570, the remainder, or subsidy element, is estimated at $1,134,720. The estimated subsidy will be further reduced by such compensation as may be received each month for the transportation of classes of mail other than air mail and air parcel post.

RATE FORMULA

The rate formula proposed herein is of the customary sliding scale adapted to meet the carrier's recognized future mail pay requirement. The base mileage has been fixed at 5500 miles per day, which is slightly under the daily average estimated to be flown in scheduled services in the month of lowest performance. The base rate has been

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[7/] Order No. E-7986, December 22, 1953 and Order No. E-8105, February 16, 1954.

established at 69.79 cents, which rate will be reduced proportionately as the mileage operated exceeds an average of 5500 miles per day and will

be further reduced by 0.90 cents per mile for each one percent increase in passenger load factor above 42 percent. Thus at the average estimated daily mileage and forecast average passenger load factor, the base rate of 69.79 cents will be reduced to an effective rate of 43.15 cents per mile.

Set forth below is a tabulation showing the operation of the formula, the estimated effective rate, and the operating income at various passenger load factors:

Rev. Psgr. Load Factors	Base Rate at Base Mi.	Downward Adjustment of Base Rate for Avg. Daily Mi. Forecast over Base Mi.	Downward Adjustment of Base Rate for Psgr. Load Factor	Estimated Effective Rate at Forecast Mi.	Net Operating Income Before Taxes	Return on Recognized Investment After Income Taxes
42	69.79¢	17.96¢	- ¢	51.83¢	1.64¢	2.73%
45	69.79	17.96	2.70	49.13	3.26	4.39
50	69.79	17.96	7.20	44.63	5.96	7.12
51.64	69.79	17.96	8.68	43.15	6.84	8.00
55	69.79	17.96	11.70	40.13	8.66	9.86
60	69.79	17.96	16.20	35.63	11.36	12.59

Under the forecast conditions, with this formula Mohawk's break-even need will be met at a passenger load factor of slightly below 41 percent.

CONCLUSION

On the basis of the foregoing considerations, we find that the fair and reasonable rate of compensation to be paid Mohawk on and after August 7, 1953, for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith between the points between which the carrier has been is presently,

[51]

or hereafter may be authorized to transport mail by its certificates of public convenience and necessity, is an effective rate per designated mile flown to be derived each calendar month by:

1. Obtaining the product of 69.79 cents times the scheduled miles flown during the month (not in excess of 5,500 miles times the number of days in the month);

2. Obtaining the product of the scheduled miles flown during the month times the product of 0.90 cent times the excess, if any, of the average passenger load factor during the month (computed to the nearest hundredth of one percent) over 42 percent load factor;

3. Subtracting the product derived under paragraph (2) from the product derived under paragraph (1), and dividing the remainder by the number of designated miles flown during the month.

Provided, however, that in no month shall the amount of mail pay computed from the rate as derived above be less than the sum of the following:

(1) The amount obtained by multiplying the service rate established for Mohawk for the transportation of air mail (including air parcel post) by the ton-miles of such mail carried during the month,[8/] and

(2) The amount obtained by multiplying the service rate established for Mohawk for the transportation of classes of mail other than air mail and air parcel post by the ton-miles of such mail carried during the month; [9/]

such mail ton-miles to be computed on the basis of direct airport-to-airport mileage between points served for the carriage of mail.

[8/] Mohawk's current rate for the transportation of air mail (including air parcel post) is 91 cents per ton-mile. Order No. E-7721, September 16, 1953.

[9/] Mohawk's current rate for the transportation of first-class and other preferential mail (other than air mail and air parcel post) is 30 cents per ton-mile. Order No. E-8105, February 16, 1954.

The aforesaid rate per airplane mile shall be applied to and the designated miles flown shall be computed on the direct airport-to-airport mileage between points served for the carriage of mail on each trip flown by DC-3 aircraft on a schedule designated or ordered to be established by the Postmaster General for the carriage of mail; and the scheduled miles flown shall be computed on the direct airport-to-airport mileage between points actually served on each trip flown in scheduled service with DC-3 aircraft, including all trips operated as extra sections thereto.

The average passenger load factor per month shall be computed to the nearest one-hundredth of one percent and shall be derived by dividing the total revenue passenger miles flown by DC-3 aircraft in scheduled passenger service during the month by the total seat-miles operated with such aircraft during the month, the total seat-miles to be derived by multiplying the number of plane miles operated with such aircraft in scheduled passenger service by 21.00, which latter figure shall be the standard seat capacity to be used for the purpose of this computation.

The compensation provided herein shall be inclusive of, and not in addition to, the mail compensation heretofore received by the carrier for mail transported on and after August 7, 1953.

An appropriate order will be entered.

MOHAWK AIRLINES, INC.
Operating Results for a Future Year as Estimated by Carrier and as Adjusted

	Carrier's Estimate	Adjustments	As adjusted Amount	As adjusted Cents per Rev. Mile	Basis of Estimate
Scheduled miles	3,002,075	-180,107	2,821,968		A
Performance factor	94.81%	.99%	95.80%		B
Revenue miles flown	2,846,267	-142,822	2,703,445		
Avail. seat-miles (000)	59,772	-3,000	56,772		C
Rev. pass.-miles (000)	29,318	-	29,318		D
Passenger load factor	49.05%	2.59%	51.64%		
Yield per rev. pass.-mile	6,650¢	.168¢	6.818¢		E
Nonmail Revenues					
Passenger	$1,949,647	$49,254	$1,998,901	73.94	F
Express	40,250	-1,861	38,389	1.42	G
Freight	34,787	1,169	35,956	1.33	G
Excess baggage	4,874	123	4,997	.19	H
Nonscheduled	18,380	-	18,380	.68	D
Incidental & other	5,800	-	5,800	.21	D
Total	2,053,738	48,685	2,102,423	77.77	
Operating Expenses					
Flying operations	1,082,719	-102,612	980,107	36.26	I
Direct maint.-flt. equip.	492,773	-94,488	398.285	14.73	J
Depreciation - flt. equip.	162,846	-5,131	157,715	5.83	K
Total	1,738.338	-202,231	1,536.107	56.82	
Ground operations	466.550	-153	466,397	17.25	L
Grd. & ind. maint.	257.046	-33,011	224,035	8.29	J
Passenger service	163,018	-12,160	150,858	5.58	M
Traffic & sales	267,718	-3,750	263,968	9.76	N
Adv. & pub.	100,000	-5,109	94,891	3.51	M
Gen. & adm.	300,358	-15,088	285,270	10.55	O
Deprec. - grd. equip.	48,594	-	48,594	1.80	D
Total	1,603,284	-69,271	1,534,013	56.74	
Total Oper. Exp.	3,341,622	-271,502	3,070,120	113.56	
Amort. of E & D and Pre-Oper.	13,000	856	13,856	.52	P
Total Expense	3,354,622	-270,646	3,083,976	114.08	
Break-Even Need	$1,300,884	$-319,331	$ 981,553	36.31	

MOHAWK AIRLINES, INC.

Explanatory Notes

A. 1.	Experience for the 12 months ended July 31, 1953 (including extra section mileage of 77,235)	2,394,996	
2.	Annualization of Elmira-Bradford mileage based on one daily round trip (service inaugurated June 1953).	48,360	
3.	Albany-Boston mileage based on three daily round trips (service inaugurated August 1953).	310,860	
4.	Additional mileage on Newark-Watertown segment based on four daily round trips on Newark-Utica portion and three daily round trips from Utica-Watertown.	67,752	2,821,968

B. Performance factor experienced for the 12 months ended July 31, 1953.

C. Computed at 21 standard available seats.

D. As estimated by carrier.

E. Passenger yield experienced for the 12 months ended July 31, 1953.

F. Application of experienced passenger yield to forecast revenue passenger miles.

G. Based on yield per revenue plane mile experienced for the 12 months ended June 30, 1953.

H. Based on ratio of excess baggage revenue to passenger revenue experienced for the 12 months ended June 30, 1953.

I. 1.	Cost per mile (34.56¢) experienced for the 12 months ended June 30, 1953.	$ 944,236	
2.	Increase in cost of gasoline	22,354	
3.	Increase cost due to the short length of hop on Albany-Boston segment (average of 39 miles between stations).	13,517	$980,107

J. Based on total maintenance cost of $30.00 per hour, allocated to the following accounts in the ratio reported for the year ended June 30, 1953:

1.	Direct maintenance - flt. equip.	$ 398.285	
2.	Ground and indirect maintenance	224,035	622,320

K. Carrier's estimate adjusted to reflect residual values of ten percent.

MOHAWK AIRLINES, INC.

Explanatory Notes

L.	1. Carrier's estimate	$466,550	
	2. Disallowance of automatic seniority payroll increases.	-4,020	
	3. Adjustment of landing fees	-4,800	
	4. Aircraft cleaners not reflected in carrier's estimate.	8,667	$466,397
M.	Carrier's estimate adjusted for lower volume of operation.		
N.	Carrier's estimate adjusted to eliminate automatic seniority payroll increases.		
O.	1. Carrier's estimate	$300,358	
	2. Adjustment of payroll taxes	-15,259	
	3. Disallowance of automatic seniority payroll increases.	-2,310	
	4. Additional property taxes based on adjusted valuation (not included above)	2,481	285,270
P.	Amortization of extension and development and pre-operating expenses over a five year period, segregated as follows:		
	1. Mohawk certificate renewal	$ 3,208	
	2. Extension of service to Boston, Mass.	7,515	
	3. Extension of service to Bradford, Penn.	1,561	
	4. Extension of service to Utica, N. Y.	1,508	
	5. Extension of service to Auburn, N. Y.	64	13,856

[56]

Appendix No. 2

MOHAWK AIRLINES, INC.

Investment Base Recognized for a Future Year

	As Reported 7/31/53	Adjustments	Recognized
Working Capital			
Current assets	$ 471,889		
Other deferred charges	18,790		
Total	490,679		
Current liabilities	687,494		
Other deferred credits	750		
Total	688,244		
Net Working Capital	$ (197,565)	$ 282,600 A	$ 85,035
Operating Property and Equip.			
Flight equipment - net	$ 633,876	-	$ 633,876
Ground property & equip.-net	518,192	-	518,192
Construction work in progress	22,154	-	22,154
Total oper. prop. & equip.	$1,174,222	-	$1,174,222
Other Assets			
Investment and special funds	$ 1,715	-	$ 1,715
Ext. & develop. and preop.exp.	65,013	$ -1,058 B	63,955
Total other assets	$ 66,728	$ -1,058	$ 65,670
Total Investment	$1,043,385	$ 281,542	$1,324,927

A. 1. To eliminate notes payable due beyond three months $ 182,600
2. Funds borrowed under bank loan agreement. 100,000 $ 282,600

B. 1. Disallowance of extension and development expenses not attributable to Bradford extension, Docket No. 5053. $ -5,089
2. Disallowance of payroll costs and entertainment expenses related to Boston extension, Docket No. 5055. -4,104
3. Legal expenses pertaining to Boston extension not reported as of July 31,1953. -4,160
4. Extension and development charges attributable to Utica extension, Docket No.4416 6,123
5. Amounts not properly identified. -2,148 $ -1,058

Order No. E-8163

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 12th day of March, 1954

MOHAWK AIRLINES, INC. MAIL RATES	:	Docket No. 6255

ORDER TO SHOW CAUSE

The Board having considered all of the information and the data set forth or specifically referred to in the Statement of Provisional Findings and Conclusions[1/] (hereinafter referred to as the "Statement"), which is attached hereto and incorporated herein, and having on the basis thereof made the provisional findings and conclusions and determined the rate specified in the Statement;

IT IS ORDERED, That Mohawk Airlines, Inc. is directed to show cause why the Board should not adopt the findings and conclusions specified in the Statement, and fix, determine, and publish the rate specified in the Statement as the fair and reasonable rate of compensation to be paid Mohawk Airlines, Inc. for the transportation of mail by aircraft, the facilities used and useful therefor and the services connected therewith over its entire system.

IT IS FURTHER ORDERED, That all further procedure herein shall be in accordance with the Rules of Practice, and if there is any objection to the rate or any other provision specified in the Statement, notice thereof shall be filed within ten days, and, if notice is filed, written answer and supporting documents shall be filed within thirty days, after the date of service of this Order.

1/ All forms, reports, schedules and tariffs filed by Mohawk Airlines, Inc., with the Board, to the date of the Board's decision, and the official mileage record of the Board are incorporated into the record of this proceeding.

[58]

[58]

IT IS FURTHER ORDERED, That if notice of objection is not filed within ten days, or, if notice is filed answer is not filed within thirty days, after service of this Order, all parties shall be deemed to have waived the right to a hearing and all other procedural steps short of a final decision by the Board, and the Board may enter an order fixing the rate specified in the Statement.

IT IS FURTHER ORDERED, That, in accordance with Rule 319 of the Rules of Practice, if answer is filed, all issues going to the establishment of the rate shall be open except as limited in prehearing conference.

IT IS FURTHER ORDERED, That this Order and the attached Statement of Provisional Findings and Conclusions be served upon all parties to this proceeding.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
Secretary

[SEAL]

[60]

Order No. E-8181

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.
Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 24th day of March, 1954

MOHAWK AIRLINES, INC. MAIL RATES	Docket No. 6255

ORDER FIXING FINAL MAIL RATE

On March 12, 1954, the Board adopted Order No. E-8163 (Order) directing Mohawk Airlines, Inc. (Mohawk) to show cause why the Board should not adopt the findings and conclusions and fix, determine, and publish the rate therein set forth as the fair and reasonable rate to be paid

Mohawk for the transportation of mail over its entire system on and after August 7, 1953.

The time designated for filing notice of objection has elapsed and no notice of objection or answer to the show cause order has been filed by any party.

All parties have therefore waived the right to a hearing and all other procedural steps short of a final decision of the Board fixing the rate.

The Board upon consideration of the record, hereby reaffirms and makes final all of the findings and conclusions in the Order.

Accordingly, IT IS ORDERED, That the fair and reasonable rate of compensation to be paid Mohawk on and after August 7, 1953, for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith between the points between which the carrier has been, is presently, or hereafter may be authorized to transport mail by its certificates of public convenience and necessity, is an effective rate per designated mile flown to be derived each calendar month by:

1. Obtaining the product of 69.79 cents times the scheduled miles flown during the month (not in excess of 5,500 miles times the number of days in the month);
2. Obtaining the product of the scheduled miles flown during the month times the product of 0.90 cent times the excess,

if any, of the average passenger load factor during the month (computed to the nearest hundredth of one percent) over 42 percent load factor;

3. Subtracting the product derived under paragraph (2) from the product derived under paragraph (1), and dividing the remainder by the number of designated miles flown during the month. 1/

Provided, however, that in no month shall the amount of mail pay computed from the rate as derived above be less than the sum of the following:

[61]

(1) The amount obtained by multiplying the service rate established for Mohawk for the transportation of air mail (including air parcel post) by the ton-miles of such mail carried during the month, 2/ and

(2) The amount obtained by multiplying the service rate established for Mohawk for the transportation of classes of mail other than air mail and air parcel post by the ton-miles of such mail carried during the month; 3/

1/ Pursuant to Reorganization Plan No. 10 of 1953, effective October 1, 1953, for mail services performed on and after that date, service mail pay is to be paid by the Postmaster General at service mail rates established by the Board, and the remainder of the total mail payments to the carriers is to be paid by the Board. The mail rate for Mohawk for the carriage of air mail (including air parcel post), established by Order No. E-7721, fixing service mail rates pursuant to Reorganization Plan No. 10, of 91 cents per mail ton-mile produces service mail pay of $31,850 for the estimated 35,000 mail ton-miles to be performed in the future year. At present, we are unable to estimate the service mail pay which Mohawk will earn for transporting classes of mail other than air mail. Accordingly, without reflecting such compensation, after deducting the estimated service mail pay for the carriage of air mail (including air parcel post) of $31,850 from the total annual mail pay of $1,166,570, the remainder, or subsidy element, is estimated at $1,134,720. The estimated subsidy will be further reduced by such compensation as may be received each month for the transportation of classes of mail other than air mail and air parcel post.

2/ Mohawk's current service rate for the transportation of air mail (including air parcel post) is 91 cents per ton-mile. Order No. E-7721, September 16, 1953.

3/ Mohawk's current service rate for the transportation of preferential and other classes of mail (other than air mail and air parcel post) is 30 cents per ton-mile. Order No. E-8105, February 16, 1954.

[62]

such mail ton-miles to be computed on the basis of direct airport-to-airport mileage between points served for the carriage of mail.

The aforesaid rate per airplane mile shall be applied to and the

designated miles flown shall be computed on the direct airport-to-airport mileage between points served for the carriage of mail on each trip flown by DC-3 aircraft on a schedule designated or ordered to be established by the Postmaster General for the carriage of mail; and the scheduled miles flown shall be computed on the direct airport-to-airport mileage between points actually served on each trip flown in scheduled service with DC-3 aircraft, including all trips operated as extra sections thereto.

The average passenger load factor per month shall be computed to the nearest one-hundredth of one percent and shall be derived by dividing the total revenue passenger miles flown by DC-3 aircraft in scheduled passenger service during the month by the total seat-miles operated with such aircraft during the month, the total seat-miles to be derived by multiplying the number of plane miles operated with such aircraft in scheduled passenger service by 21.00, which latter figure shall be the standard seat capacity to be used for the purpose of this computation.

The compensation provided herein shall be inclusive of, and not in addition to, the mail compensation heretofore received by the carrier for mail transported on and after August 7, 1953.

IT IS FURTHER ORDERED, That this order fixing the fair and reasonable final rate be effective as of this date.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
Secretary

[SEAL]

[63]

Nov. 7, 1955

Mr. W. D. Bosworth
Treasurer, Mohawk Airlines, Inc.
Cornell University Airport
Ithaca, New York

Dear Mr. Bosworth:

An examination was made of the data upon which subsidy payments were based and paid to Mohawk Airlines, Inc., covering the period

October 1, 1953 through June 30, 1954, and the findings reported by this Office to the Budget and Fiscal Section of the Civil Aeronautics Board, for possible adjustment of your mail pay claims where indicated.

The examination disclosed numerous errors and omissions on POD Forms 2714 in reporting irregular flights and deviations from scheduled operations, due to weather, accommodating passengers, detours to the maintenance base, and so forth. It was noted that explanations of such irregular flights required to be shown in the "Remarks" column of Form 2714, were often erroneous and in many instances missing entirely.

Procedures should be set up to provide for the proper reporting on Form 2714 of irregular flights and this Office should be advised as to what steps have been taken to insure accurate reporting and the effective date thereof.

Reference is made to discussions between Mr. Perry R. Baker, Supervising Auditor, and yourself, concerning your policy of classifying the complete round trip of extra section flights as revenue miles flown. Usually such flights carried a revenue load in only one direction, the other portion of the flight being operated as a ferry flight to position the aircraft.

According to instructions contained in the CAB Form 41 Manual, and interpreted in Standard Practices Letter No. 15, circulated to all air carriers June 15, 1955, extra section flights are those operated to accommodate overflow traffic from regularly scheduled flights and should be reported as

revenue miles in scheduled service. Flights made in ferrying aircraft to meet schedules, or for similar operational reasons, are not extra sections and should be reported as non-revenue miles even if an occasional shipment of revenue traffic is on board as a matter of special accommodation.

An analysis was made for this audit period, October 1, 1953 through June 30, 1954, of the extra section miles reported on schedule C-1 of Form

41, as revenue miles in scheduled service. It was disclosed that they included ferry flights on which no revenue loads were carried, summarized as follows:

October 1953	2,354	January 1954	1,209	April 1954	2,232
November 1953	2,186	February 1954	1,275	May 1954	1,120
December 1953	4,787	March 1954	1,695	June 1954	1,892
				Total	18,750

If the practice of reporting this type of ferry mileage as revenue plane miles has continued since the audit period indicated above, it is requested that you immediately take steps to insure the proper classification of such mileage as non-revenue plane miles in the future. Please advise this Office within a reasonable time, of your compliance with this request and the effective date of the change in your practice.

The Rates Division of the Board has been advised of this exception to your practice for consideration in your mail rate case.

Very truly yours,

Warner H. Hord
Chief, Office of Carrier
Accounts and Statistics

cc: Executive Director

FRCallahan-gmp (FRC)

cc: B-40
B-42
B-19

[65]

[Received Dec. 7, 1955]

MOHAWK AIRLINES, INC.
GENERAL OFFICES
CORNELL UNIVERSITY AIRPORT
ITHACA, NEW YORK

December 6, 1955

Mr. Warner H. Hord
Chief, Office of Carrier Accounts and Statistics
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Hord:

[65]

the findings of the CAB audit group upo n their examination of the data upon which subsidy payments were based and paid to Mohawk Airlines, Inc. covering the period October 1, 1953 through June 30, 1954, we wish to make the following statements:

1. Under date of May 27, 1954 we reported to your office, as requested by Instruction Letter No. 1 under Reorganization Plan No. 10, a detailed description of the procedures followed by Mohawk Airlines, Inc. for authorizing extra sections of regular flights as follows:

"A regular procedure is followed in authorizing extra sections of regular flights as follows: The Sales Department maintains a log sheet for each month by day. First they list the "Posted Flights" under the proper day as that information comes into them from the station. A "Posted Flight" is one that has 22 seats sold. Then, upon review of the "Posted Flights" and additional information received from stations in regards to additional requests for space on these flights, the Sales Department makes requests to the Operations Department for extra sections and the extra sections requested are listed on the log sheet. Finally, as the requests for extra sections are confirmed by the Operations Department, the confirmed extra sections are listed

[66]

on the log sheet and, in most cases, the confirmed extra sections are flown unless cancelled for mechanical reasons, weather, etc.

"The request for extra sections by the Sales Department is based upon a very careful evaluation of estimated revenue, and comparing that revenue with the cost of operating the flight. The cost of operating the flight is based on the application of a pre-determined cost per mile to the total round trip miles to be flown and, in the same manner, the revenue yield is estimated on the round trip. The result of this careful analysis of expense and revenue is that extra sections are not flown unless the estimated round trip revenue potential exceeds the estimated round trip cost of operation."

2. Another way of stating the last sentence above would be, "We do not fly extra sections unless it is estimated that the round trip flight will decrease our breakeven need." The result of following such a policy consistently over the past seven years has been a marked reduction in the break-even need which has been the basis for the permanent mail rates set by the Rates Division of the Board. In other words, our permanent mail rates would have been set higher and would have returned more mail pay to us if the past years' breakeven needs, on the basis of which the forecast future years' mail rates were set, had not been reduced because of our flying round trip extra sections which more than paid their way.

3. Until we received Standard Practices Letter No. 15 at the time the audit group was with us in June of this year, we had received no indication from previous audit groups or as a result of our letter of May 27, 1954 referred to above that our interpretation of instructions contained in the CAB Form 41

Manual relative to extra section flights might be in variance with that of your office or with other carriers. As indicated to Mr. Perry R. Baker, Supervising Auditor, when discussing Standard Practices Letter No. 15, we very strongly object to the position that the return trip miles of a round trip extra section set up in the manner that it is by Mohawk Airlines should not be considered revenue miles for purposes of reporting on CAB Form 41 and for purposes of mail pay computation. Since the extra section is established on the basis of the round trip breaking even, (without benefit of subsidy) and our subsidy formula being what it is, if one direction is considered a ferry, then the government would receive a substantial part of the income for the loaded flight while the airline would stand the cost of returning the ship without benefit of revenue on the return. Thus, what was figured to be a flight that would pay its way might result in a net loss to the airline.

4. In addition to the fact that round trip extra sections are not set up unless it appears that our breakeven need would be decreased as a result, it should be pointed out that the procedure calls for every possible attempt to be made to pick up as much revenue as possible on the return portion of the trip by advising all scheduled stops of the flight. Consequently, the express purpose of the entire round trip flight is to carry revenue and not to ferry aircraft to meet schedules or for similar operational reasons.

5. We contend for the reasons noted above that there should be no adjustment of our mail pay claims for the period under review here, October 1953 through June 1954 because of our inclusion in "revenue miles" of the return portion of extra sections set up to carry revenue. It should be noted that Standard

Practice Letter No. 15 giving the CAB's interpretation of "revenue miles" was not circulated until June 1955, or one year later than the period under review. In rereading instructions contained in the CAB Form 41 Manual, we are unable to find anything which, in our opinion, would require that we consider the return portion of a round trip extra section, set up on the basis that we set it up, as non-revenue miles.

6. Our practice of reporting the return portion of round trip extra sections as revenue plane miles has continued since the audit period referred to above. It is our position that our policy should not be changed, because to follow the procedure specified in Standard Practices Letter No. 15 would make many extra sections yield a net loss to the airline as explained in the second paragraph of #3 above. This would require a decrease in service to the public and would increase our breakeven need.

7. In regards to the reporting on Form 2714 of irregular flights, we wish to advise that the procedures were reviewed very thoroughly in June of this year with the girls who make up the Form 2714, and we feel confident

that the present reporting is accurate.

Thank you for your careful consideration of our position in regards to extra section miles.

Very truly yours,

/s/ W. D. Bosworth
Treasurer

[69]

February 14, 1956

Mr. W. D. Bosworth
Treasurer
Mohawk Airlines, Inc.
Cornell University Airport
Ithaca, New York

Dear Mr. Bosworth:

Your letter of December 6, 1955, in which you state your reasons for including ferry mileage as revenue plane miles flown by extra section flights in your reports to the Board for the period October 1, 1953 through June 30, 1954, has been referred to the Carrier Payments Unit for appropriate action and to the Mail Rates Section for consideration in your current mail rate proceedings.

In our letter of November 7, 1955, on the same subject, you were requested to notify this Office, within a reasonable time, of the measures taken by you to insure the proper classification in future reports to the Board of ferry mileage as non-revenue plane miles. Your letter of December 6, 1955, does not indicate compliance with our request.

It is requested that your Company comply with Standard Practice Letter No. 15 beginning January 1, 1956. We are not requesting at this time that your reports for the period July 1, 1955 to December 31, 1955, be corrected; however, if the current proceedings require a formula to be used in computing mail pay for that period, additional information may be required at a future date.

Please advise this Office at an early date as to whether controls

have been established to insure the segregation beginning January 1, 1956, of ferry mileage from revenue plane miles in accordance with Standard Practice Letter No. 15.

Very truly yours,

Warner H. Hord
Chief, Office of Carrier Accounts
and Statistics

WAFunnell-gmp-B-46-2/13/56

[70]

[Received March 13, 1956]

MOHAWK AIRLINES, INC.
GENERAL OFFICES
CORNELL UNIVERSITY AIRPORT
ITHACA, NEW YORK

March 9, 1956

Mr. Warner H. Hord
Chief, Office of Carrier
Accounts and Statistics
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Hord:

In reply to your letter of February 14, 1956 in connection with our policy of considering the return portion of an extra section flight as revenue miles rather than non-revenue miles, please be advised that we have this date established the necessary controls to insure the segregation of these miles as non-revenue miles. Although we have done this, we do not, as indicated in our letter of December 6, 1955, consider it to be proper because of the manner in which we set up extra sections which has been followed consistently over the past years and used as a basis for determining our mail rates.

We had not changed our procedures in accomplishing the reporting of extra section miles prior to this date pending receipt from you of a reply to our letter of December 6, 1955; therefore, our reports for the first two months of 1956 will be on the old basis. It would be difficult at

[71]

this time to come up with an accurate picture of the mileages under the new basis for those months but we can estimate the changes and report them accordingly if you wish.

Very truly yours,

/s/ W. D. Bosworth
Treasurer

[71]

March 28, 1956

Mr. W. D. Bosworth
Treasurer
Mohawk Airlines, Inc.
Cornell University Airport
Ithaca, New York

Dear Mr. Bosworth:

Reference is made to your letter of March 9, 1956 in which you advise us that you have established, effective March 1, 1956, the necessary controls to ensure the reporting of the return portion of extra-section flights as non-revenue miles.

It is not requested that you change your reporting for the months of January and February 1956; however, it is requested that you estimate the effect of such flights on your reported mileages as suggested in your letter of March 9, 1956 and hold this information on file so that it may be used in future audits of mail pay billings.

Very truly yours,

Warner H. Hord
Chief, Office of Carrier Accounts
and Statistics

WFunnell:if:3/26/56

cc: B-46 (2)
B-43 (2)
B-40

October 25, 1957

Mr. Frank R. Chabot
Assistant Treasurer
Mohawk Airlines, Inc.
Oneida County Airport
Utica, N. Y.

Dear Mr. Chabot:

Field audits of certain carriers whose mail rates involve the sliding-scale type of formula have revealed that some miles claimed as extra-section miles for the purpose of subsidy mail pay should not have been so claimed. As a result, amounts have been paid as subsidy in excess of what was due the carrier.

The extra-section miles problem is one of long standing which predates the transfer of the subsidy payment function to the Board, effective October 1, 1953. The position taken by the Board soon after adoption of the sliding-scale, passenger load factor formula was that the term "extra section" referred basically to a flight which is operated, for traffic purposes only, as part of the carrier's schedules in order to accommodate traffic which cannot be handled on the regular flights.

In its dealings with the carriers with respect to reporting (for Form 41 purposes) the Office of Carrier Accounts and Statistics has had, over the years, several occasions to go into the question, with individual carriers, of what properly constituted extra-section flights. Field audits for subsidy verification purposes following Reorganization Plan 10 of 1953, have disclosed more fully the extent of the problem and the need for a uniform approach to the question of under what circumstances extra-section miles would be allowable for subsidy payment purposes.

The technique used in conducting the field audits has been to check the passenger load factor of both the scheduled flight and of the extra section to determine whether the combined passenger load factor of the reported extra section and the regularly scheduled flight exceeds 100 per cent of the normal passenger capacity of the aircraft type used in the regularly scheduled flight. The audits reveal that in virtually all cases,

extra-section miles have been claimed by carriers for subsidy mail pay purposes which do not meet the foregoing test, hereinafter referred to as the "combined load-factor test."

In view of the situation brought to light by the audits, a thorough re-evaluation of the extra-section mile question has been presented to the Board. After careful consideration, the Board has determined that:

[73]

(a) The pertinent provision of the applicable rate orders may legally and properly be interpreted as providing a basis for requiring that the "combined load-factor test" be met with respect to extra-section miles claimed for subsidy payment purposes;

(b) That past payments should be reviewed and extra-section miles not meeting the "combined load-factor test" should be disallowed with the resultant adjustments made in the payment accounts;

(c) That in future, all extra-section miles claimed under a sliding-scale formula be supported with the necessary detail to permit determination that the "combined load-factor test" is met.

As you are no doubt aware, the field auditors in July 1955 and May 1956 completed a review of Mohawk's statistical procedures and data for the periods October 1, 1953 to June 30, 1954 and July 1, 1954 to June 30, 1955, respectively, to determine whether the carrier's reporting practices were in compliance with the provisions of the Uniform System of Accounts, and whether the carrier has adequately detailed and supported its claim for subsidy mail pay. The review disclosed that Mohawk has operated and claimed extra-section miles which do not meet the "combined load-factor test."

Therefore, in order to carry out the decisions of the Board as set forth above, a re-examination in light of the field audit findings of Mohawk's claims covering the above periods is being undertaken. A

preliminary analysis indicates that approximately $50,000 has been paid the carrier for extra-section mileage not meeting the "combined load-factor test."

Upon completing the review of the carrier's claims, it is proposed to deduct the overpayment from amounts currently due the carrier. A summary of the mileage disallowance will be furnished the carrier.

Sincerely yours,

/s/ M. C. Mulligan
Secretary and Comptroller

JBR:fr 10/23/57

cc: B-15, 2
B-17, 2
B-29, 1
B-40, 1

[74]

[Received Dec. 2, 1957]

MOHAWK AIRLINES, INC.
EXECUTIVE OFFICES
ONEIDA COUNTY AIRPORT
UTICA, NEW YORK

November 25, 1957

Mr. M. C. Mulligan
Secretary and Comptroller
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Mulligan,

We acknowledge receipt of yours of October 25th to Frank R. Chabot, Assistant Treasurer, on the subject of reported extra section miles and their application to the sliding scale type of mail rate formula. We strongly disagree with the apparent implication in the letter that Mohawk has received mail pay which has not been earned. We also disagree with the so-called "combined load factor test" set forth. Being in complete disagreement, we are writing to ask if the letter represents a final determination of the questions involved so that we are in a position to seek judicial review, or whether it is necessary for us to ask the Board for a declaratory ruling in order to have such a final determination.

With respect to the merits we earnestly seek a reconsideration of the position which you have taken. In our opinion the program you contemplate would be an unlawful retroactive recapture of mail pay already paid out to Mohawk during its closed rate periods.

Mohawk has always operated a substantial amount of extra section miles to take care of peak traffic demands. We have specifically programmed our maintenance work on aircraft through the early adoption of a phase overhaul program to provide the maximum number of aircraft available at peak periods during a week.

The extra section miles (including those miles which you now propose to call ferry miles under the "combined load factor test") in our several mail rate cases establishing final rates for Mohawk and reported load factors for these miles were relied on both by the mail rate staff and by the carrier as a basis for establishing the future total compensation to be received.

[75]

The load factor figure made a part of the final rate orders had as its base Mohawk's reported load factors for the prior periods and for the 1953-1955 period under consideration. To retroactively change a reporting base for this past period changes the total compensation to be received and is clearly unlawful. While we must contend that the "combined load factor test" does not satisfactorily handle the problem because it will not accurately reflect the company operations in fact, our primary objection is not to its application in the future. For the past period involved, however, the Board is without authority to reduce by an administrative determination the total compensation awarded to the carrier.

The mail rate staff and the Board is adopting the various final rate orders for Mohawk has never disallowed a mile of its operations over Route No. 94. This fact involves a finding by the rate staff and the Board that Mohawk's load factors have been such as to justify each revenue mile operated. The Board then, has agreed with the overall results of Mohawk's scheduling policies in relation to capacity provided.

This means, of necessity, that extra section miles for the period involved that would not meet the combined load factor test would have been classified as non revenue miles and their costs allowed.

In summary, therefore, we urge that the Board does not have the authority to make the determination, paragraph (a) at the top of page 2. It follows that the adjustments in the payments accounts provided for in paragraph (b) cannot be proper.

The urgency of this matter is brought about by your final paragraph where you suggest that the Board may deduct the "overpayment from amounts currently due the carriers". If any possibility such deduction exists, we will have immediate need for an additional $50,000, and would be forced to file a petition for a temporary rate increase to obtain it.

We would appreciate an early reply in response to our views expressed herein.

Very truly yours,

/s/ John R. Carver
Vice President - General Counsel

JRC/cab

CC: J. H. FitzGerald
Warner H. Hord

[76]

COPY

December 17, 1957

AIR MAIL

Mr. John R. Carver
Vice President - General Counsel
Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Dear Mr. Carver:

I have your letter of November 25, 1957, in reply to mine of October 25, 1957, regarding extra-section miles.

In response to your inquiry, my aforesaid letter does not represent a "final determination". Even had Mohawk been prepared to accept, in

principle, the determinations of the Board set forth in my letter, actual offset against current billings would not have been undertaken until a thorough analysis of the audit work papers had been completed by this Office, the details of the proposed adjustments submitted to Mohawk, and its comments thereon received.

Since your letter questions the legal authority of the Board to take the action in question, it will be referred to the General Counsel for consideration. In the meantime, please be assured that before any final action is taken Mohawk will be given an opportunity to formally request different treatment with respect to extra-section miles for the past periods involved, should your company decide it desires to do so. It is suggested, however, that this question might best be resolved after specific details have been compiled from the audit work papers and after further exploration of the legal issues raised by your letter.

Yours very truly,

/s/ M. C. Mulligan
Secretary and Comptroller

MCMulligan/rp 12/17/57

cc: Mr. Mulligan B-15 (2)
Mr. Stone B-30
Mr. FitzGerald B-60
Mr. Hord B-40
Mr. Russell B-17

[77]

25 April 1958

Mr. John R. Carver
Vice President -
General Counsel
Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Dear Mr. Carver:

Reference is made to my letter of October 25, 1957, regarding the problem of extra section miles claimed for past periods under the sliding scale formula. In such letter it was stated that, after careful consideration of the matter in light of information developed by field audits, the

Board had determined that extra section miles not meeting the "combined load factor test", as therein outlined, should be disallowed.

In the meantime, protests have been received from the carriers concerned challenging the "combined load factor test" on various grounds. These protests were submitted to the Board.

Upon reconsideration of the entire matter, the Board has reached the conclusion that its action, as outlined in my aforesaid letter, should be amended so as to eliminate the "combined load factor test" and in lieu thereof, the Board has determined to apply a test in terms of the number of passengers carried on the extra section flight only. Accordingly, the Board has adopted the following test as a basis for final determination of the mileage to be allowed, for subsidy payment purposes, in connection with extra section flights, in those periods and for those carriers, where a sliding scale formula is involved: "Mileage claimed in connection with any extra section which did not carry more than three passengers over some segment of the regularly scheduled trip will be disallowed".

This Office is proceeding to work out in detail the result of applying the revised test, as stated above, to extra section miles heretofore claimed for payment purposes by Mohawk Airlines, Inc., and you will be advised with respect thereto as promptly as possible. Upon receipt and review of this information, if your company seeks to justify particular extra section flights as bona fide, even though such flights may fail to meet the new test, this Office will be glad to consider whatever information concerning those particular flights as you may care to submit.

Sincerely yours,
/s/ M. C. Mulligan
Secretary and Comptroller

MCM/11d/4-24-58
B-15 2
B-17 1
B-29 2
B-46 1

[78]

[Rec'd June 1958]

MOHAWK AIRLINES, INC.
EXECUTIVE OFFICES
ONEIDA COUNTY AIRPORT
UTICA, NEW YORK

May 28, 1958

Mr. M. C. Mulligan
Secretary and Comptroller
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Mulligan:

I am in receipt of a copy of your letter of April 25th, to Mr. Durand of the ATA with respect to the problem of extra section miles claimed for past periods under the sliding scale formula.

You note that protests were received from the carriers concerned, challenging the "combined load factor test" on various grounds. Finally, you note that the Board has reconsidered the matter, that the combined load factor test has been eliminated and that "where a sliding scale formula is involved: 'Mileage claimed in connection with any extra section which did not carry more than three passengers over some segment of the regularly scheduled trip will be disallowed.'"

This new test adopted by the Board will clearly reduce the penalty on Mohawk compared to the first proposal. However, it still does not meet our basic objection. First of all, Mohawk has no particular objection to a new reporting method set up for the future, if taken into consideration by the Board and its rate staff in setting a final future rate. It is our position, however, that a new reporting method cannot be used retroactively to recapture subsidy dollars called for by a Board final rate order during the past period.

During any past period where the sliding scale formula was applicable to Mohawk it was contained in a final rate order. In turn the various elements going to make up the formula were the result of Mohawk's reported operation during a base period. Following the final rate order, Mohawk continued to report in the same manner as it did in the past period. Said differently, if the change in reporting method had been known and accepted

at the time of Mohawk's final rate conferences, the elements which went into making up the formula established by the final rate order would have been changed so as to reflect the change in reporting method and the end result would have been a slightly different formula, designed to provide Mohawk the same number of dollars

of subsidy as was determined by the final rate order to be necessary to provide for breakeven need and a reasonable return on investment. A recapture of any portion of this subsidy cannot be made today because to do so would violate the Boards final rate order.

We therefore do not object to a new reporting method in the future but we remain convinced that the Boards present proposal, as well as its first proposal on the subject, violates the final rate orders established by the Board for Mohawk during the past closed rate periods and, as such, is both unfair and legally defective.

We would appreciate the opportunity to present our views on this matter to the Board prior to the final adoption of any reporting change affecting past closed rate periods.

Very truly yours,

/s/ John R. Carver
General Counsel

JRC/cab

cc: Frank R. Chabot
Joseph FitzGerald

[80]

August 19, 1958

Mr. John R. Carver
Vice President & General Counsel
Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Dear Mr. Carver:

Reference is made to the Secretary and Comptroller's letter of

April 25, 1958, advising, in connection with the problem of extra section miles, that the Board had determined that "mileage claimed in connection with any extra section which did not carry more than three passengers over some segment of the regularly scheduled trip will be disallowed." Reference is also made to your letter of May 28, 1958.

In answer to your objection to the adjustment of miles flown during the closed rate period, it should be stated that the Board views its action in this matter as an interpretation of mileage language and is consistent with the mail rate order. Although the end result might be a recapture of subsidy paid during a past period, this is not a violation of the finality of the rate, any more than it could be asserted that field audit adjustments to correct clerical discrepancies of reported revenue passenger-miles, also resulting in a recapture, in any way violate the finality of a rate.

The review of the field audit of Mohawk Airlines, Inc., has been completed and it has been found that in addition to adjustments to extra section miles flown under the revised test, adjustments to reported revenue passenger-miles are necessary to correct clerical errors.

With respect to the extra section miles, although all the facts are not available upon which to base a final adjustment, since the field audit did not report the details for nine months during 1954 and 1955, a tentative adjustment has been determined, based upon the projection of the results of the period fully audited, October, 1953 through June 1954, October 1954, January and May 1955. For these twelve months, as shown on the attached table, 42,332 miles or 28.27% of 149,728 extra section miles flown have been disallowed as not meeting the revised test. On the assumption that Mohawk's operations during this 12-month period were characteristic of its

operations during the entire 21-month period under review, it is believed equitable and appropriate to compute the extra section mileage adjustment for the nine months not audited by applying the ratio of 28.27% to the extra section miles flown during such period.

This same technique has been used to reduce passenger-miles related to the disallowed extra section trips. Thus, for the 12-months audited, passenger-miles have been reduced by 23,586, or .0672%. For the nine unaudited months, applications of this ratio results in a reduction of 21,561.

In addition to the passenger-mile adjustments discussed above, other adjustments to this item have been made to correct clerical errors made by the carrier in reporting the passenger load-factor in the Form 41 reports and in the subsidy billings. The details of these adjustments, as well as the extra section mileage adjustments are shown in the attached tables.

In accordance with the foregoing, the subsidy earnings of Mohawk for the period October 1, 1953 through June 30, 1955, have been recalculated with the result that there would be a refund due from the carrier in the total amount of $26,439.01, of which $1,183.74 is attributable to clerical errors and $25,255.27 to extra section adjustments. The table below shows the breakdown of the total refund by month.

October, 1953	$ 888.50	September, 1954	1,271.58
November	1,080.97	October	1,474.65
December	2,265.40	November	1,521.14
January, 1954	708.50	December	1,840.95
February	683.69	January, 1955	2,024.69
March	968.60	February	432.06
April	1,757.88	March	585.44
May	503.86	April	1,092.71
June	2,227.54	May	1,323.96
July	904.21	June	1,732.22
August	1,150.46	Total	$ 26,439.01

It is requested that you review the attached data promptly, in which connection reference is made to the last paragraph of the aforementioned letter of April 25, 1958. If any specific extra section trips can be justified, despite the fact that they do not meet the revised test, please forward explanatory details for our review. As an alternative to the computed adjustment for the nine months not audited, Mohawk may desire to furnish actual results of extra section trips.

With respect to the amount refundable to the Board due to adjustments for clerical errors, it is proposed that if no information is received from Mohawk within 30 days, the $1,183.74 will be offset against the next subsidy billing.

With respect to the adjustments for extra sections, no further action is now planned prior to receiving a reply from the carrier. If you feel that a meeting in Washington to discuss the problem would be helpful, we will be pleased to arrange one at your convenience.

Sincerely yours,

/s/ John B. Russell
Chief, Office of Administration

Attachment

jrherman/11d/8-18-58
B-15
B-29

CIVIL AERONAUTICS BOARD

Mohawk Airlines, Inc.
Adjustment of Subsidy Earnings
Resulting from Field Audit
October 1953 - June 1954

	1953			1954					
	October	November	December	January	February	March	April	May	June
1. Sch. miles flown per 2714	261,026	230,117	223,643	188,516	189,220	210,769	225,554	284,872	283,285
2. Extra sec. miles adjustment	-2,220	-2,891	-6,180	-1,995	-1,968	-2,644	-5,229	-2,011	-2,761
3. Adj. scheduled miles flown	258,806	227,226	217,463	186,521	187,252	208,125	220,325	282,861	280,524
4. Adj. Avail. seat-miles (L.3 x 21)	5,434,926	4,771,746	1,566,723	3,916,941	3,932,292	4,370,625	4,626,825	5,940,081	5,891,004
5. Rev. pass.-miles reported	2,853,306	2,296,136	2,244,594	1,833,207	2,139,016	2,461,473	2,965,360	3,440,203	3,750,730
6. Adjustment per L. 2	-280	-894	-1,090	-2,256	-1,347	-1,470	-5,723	-1,732	-2,411
7. Adj. for clerical errors	+830	-	-1,543	+857	-	+696	+85	-4,175	+30,422
8. Adj. revenue pass.-miles	2,853,856	2,295,242	2,241,961	1,831,808	2,137,669	2,460,699	2,959,722	3,434,296	3,778,741
9. Adj. load factor (L. 8 ÷ L. 4)	52.51%	48.10%	49.09%	46.77%	54.36%	56.30%	63.97%	57.82%	64.14%
10. Excess load factor over 42.00%	10.51%	6.10%	7.09%	4.77%	12.36%	14.30%	21.97%	15.82%	22.14%
11. Reduction per mile (L. 10 x .90¢)	.094590	.054900	.063810	.042930	.111240	.128700	.197730	.142380	.199260
12. Amt. of reduction (L. 3 x L. 11)	24,480.46	12,474.71	13,876.31	8,007.35	20,829.91	26,785.69	43,564.86	40,273.75	55,897.21
13. Base pay	118,991.95	115,153.50	118,991.95	118,991.95	107,476.60	118,991.95	115,153.50	118,991.95	115,153.50
14. Adj. total pay (L. 13 - L. 12)	94,551.49	102,678.79	105,115.64	110,984.60	86,646.69	92,206.26	71,588.64	78,718.20	59,256.29
15. Service pay	2,432.43	1,999.27	3,759.24	1,986.53	2,230.41	2,680.86	2,866.50	3,036.67	3,152.24
16. Adjusted subsidy	92,079.06	100,679.52	101,356.40	108,998.07	84,416.28	89,525.40	68,722.14	75,681.53	56,104.05
17. Subsidy paid	92,948.72	101,742.63	103,570.39	109,692.54	85,099.30	90,494.00	70,469.29	76,185.11	58,331.59
18. Refund due from carrier	869.66	1,063.11	2,213.99	694.47	683.02	968.60	1,747.15	503.58	2,227.54
19. Portion of refund attributable to:									
a. Clerical errors	45.99	-	-68.67	33.59	-	37.94	20.30	-184.36	1,298.95
b. Extra section adjustment	823.67	1,063.11	2,282.66	660.88	683.02	930.66	1,726.85	687.94	928.59

CIVIL AERONAUTICS BOARD

Mohawk Airlines, Inc.
Adjustment of Subsidy Earnings
Resulting from Field Audit
July 1954 - June 1955

Total from pick-up 12,667

	1954						1955					
	July	August	September	October	November	December	January	February	March	April	May	June
1. Sch. mi. fln. per adj. 2714	291,736	312,778	275,846	288,493	218,035	233,022	236,585	188,310	243,259	255,712	274,635	276,560
2. Comp. extra sec. miles adj.	-2,783	-3,504	-3,669	-4,158	-4,531	-5,242	-5,639	-1,616	-2,822	-4,278	-4,636	-5,890
3. Adj. sch. mi. fln.	288,953	309,274	272,177	284,335	213,504	227,780	230,946	186,694	240,437	251,434	270,199	270,670
4. Adj. seat-mi. fln. (L. 3 x 21)	6,068,013	6,494,754	5,715,717	5,971,035	4,483,584	4,783,380	4,849,866	3,920,574	5,049,177	5,280,114	5,674,179	5,684,070
5. Rev. pass.-miles reported	3,667,963	5,232,027	3,682,687	4,009,523	2,931,056	3,015,280	3,074,649	2,448,068	3,135,163	3,783,267	4,050,464	4,189,367
6. Comp. rev. pass.-miles adj.	-2,465	-3,516	-2,475	-1,716	-1,970	-2,026	-1,541	-1,645	-2,107	-2,542	-3,126	-2,815
7. Adj. rev. pass.-miles	3,665,498	5,228,511	3,680,212	4,007,807	2,929,086	3,013,254	3,073,108	2,446,423	2,133,056	3,780,725	4,047,338	4,186,552
8. Adj. load factor (L. 7 ÷ 4)	60.41%	80.50%	64.39%	67.12%	65.33%	62.99%	63.36%	62.40%	62.05%	71.60%	71.33%	73.65%
9. Excess load factor over 42.00%	18.41%	38.50%	22.39%	25.12%	23.33%	20.99%	21.36%	20.40%	20.05%	29.60%	29.33%	31.65%
10. Reduction per mile (L. 9 x .90¢)	.165690	.346500	.201510	.226080	.209970	.188910	.192240	.183600	.180450	.266400	.263970	.284850
11. Amt. of reduction (L. 3 x 10)	47,876.62	107,163.44	54,846.39	64,282.46	44,829.43	43,029.92	44,397.06	34,277.02	43,386.86	66,982.02	71,324.43	77,100.35
12. Base pay	118,991.95	118,991.95	115,153.50	118,991.95	115,153.50	118,991.95	118,991.95	107,476.60	118,991.95	115,153.50	118,991.95	115,153.50
13. Adj. total mail pay (L. 12 - 11)	71,115.33	11,828.51	60,307.11	54,709.49	70,324.07	75,962.03	74,594.89	73,199.58	75,605.09	48,171.48	47,667.52	38,053.15
14. Ser. mail pay	3,168.62	6,656.65	3,279.64	3,480.22	2,498.94	3,548.58	2,722.68	2,606.15	3,483.60	3,298.04	3,634.21	3,731.74
15. Adj. subsidy	67,946.71	5,171.86	57,027.47	51,229.27	67,825.13	72,413.45	71,872.21	70,593.43	72,121.49	44,873.44	44,033.31	34,321.41
16. Subsidy paid	68,859.92	6,322.52	58,299.05	52,703.92	69,346.27	74,254.40	73,896.90	71,025.49	72,706.93	45,966.15	45,357.27	36,053.63
17. Refund due from carrier	904.21	1,150.46	1,271.58	1,474.65	1,521.14	1,840.95	2,024.69	432.06	585.44	1,092.71	1,323.96	1,732.22

CIVIL AERONAUTICS BOARD

Mohawk Airlines, Inc.
Extra Section Mileage Adjustment
October 1953 - June 1955

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
October 9, 1953	103	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
18		EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
	105	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
3	109	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
9	209	EWR-BGM	2	140	280
		BGM-ITH	0	32	
				172	280
23	109	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
11	114	ITH-BGM	0	32	
		BGM-EWR	0	140	
				172	
24	136	UCA-EWR	0	179	
10	150	ITH-UCA	0	71	
		UCA-ALB	0	83	
		ALB-PSF	0	34	
		PSF-BAF	0	35	
		BAF-ORH	0	44	
		ORH-BOS	0	44	
				311	
31	150	ITH-BGM	0	32	
		BGM-UCA	0	71	
		UCA-ALB	0	83	
		ALB-PSF	0	34	
		PSF-BAF	0	35	
		BAF-ORH	0	44	
				299	
9	161	BOS-UCA	0	227	
Total				2,220	280

Date	Trip Number	55 Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
November 30, 1953	102	ITH-BGM	1	32	32
		BGM-EWR	1	140	140
				172	172
1	103	EWR-BGM	3	140	420
		BGM-ITH	0	32	
				172	420
13	103	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
25	103	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
1	204	BUF-ROC	1	55	55
		ROC-ITH	1	75	75
				130	130
14	104	BUF-ROC	0	55	
		ROC-ITH	0	75	
				130	
29	104	ITH-BGM	0	32	
		BGM-EWR	0	140	
				172	

[86]

November 1, 1953	105	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
20	105	EWR-BGM	0	140	
		BGM-ITH	0	32	
		ITH-ROC	0	75	
				247	
24	109	EWR-BGM	1	140	140
		BGM-ITH	1	32	32
				172	172
	115	ITH-BGM	0	32	
		BGM-EWR	0	140	
				172	
	135	EWR-UCA	0	179	
		UCA-SYR	0	38	
				217	
29	236	SYR-UCA	0	38	
		UCA-EWR	0	179	
				217	
24	137	EWR-UCA	0	179	
		UCA-SYR	0	38	
		SYR-ITH	0	46	
				263	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
29	144	ITH-UCA	0	71	
		UCA-ALB	0	83	
				154	
25	255	BOS-ORH	0	44	
		ORH-BAF	0	44	
		BAF-ALB	0	69	
				157	
Total				2,891	
December 18, 1953	103	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
19	103	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
11	105	EWR-BGM	3	140	420
		BGM-ITH	2	32	64
				172	484
18	205	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
20	108	ITH-ELM	2	32	64
		ELM-BGM	0	47	
				79	64
4	109	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
30	209	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
24	112	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
18	135	EWR-UCA	0	179	
24	136	UCA-EWR	0	179	
18	109	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
Dec. 26, 1953	150	ITH-BGM	0	32	
		BGM-UCA	0	71	
		UCA-ALB	0	83	
		ALB-PSF	0	34	
		PSF-BAF	0	35	
		BAF-ORH	0	44	
		ORH-BOS	0	44	
				343	
23	250	ITH-BGM	0	32	
		BGM-UCA	0	71	
		UCA-ALB	0	83	
		ALB-PSF	0	34	
		PSF-BAF	0	35	
		BAF-ORH	0	44	
		ORH-BOS	0	44	
				343	
26	250	Same as Trip No. 250, 12-23-53	0	343	
27	250	Same as Trip No. 250, 12-23-53	0	343	
18	151	UCA-SYR	0	38	
24	151	BOS-ORH	0	44	
		ORH-BAF	0	44	
		BAF-PSF	0	35	
		PSF-ALB	0	34	
		ALB-UCA	0	83	
		UCA-SYR	0	38	
		SYR-ITH	0	46	
				324	
24	251	Same as Trip No. 151 12-24-53	0	324	
23	155	Same as Trip No. 151 12-24-53	0	324	
30	155	Same as Trip No. 151 12-24-53	0	324	
23	255	Same as Trip No. 151 12-24-53	0	324	
26	355	Same as Trip No. 151 12-24-53	0	324	
24	155	ALB-UCA	0	83	
		UCA-SYR	0	38	
		SYR-ITH	0	46	
				167	
27	155	BOS-ORH	0	44	
		ORH-BAF	0	44	
		BAF-PSF	0	35	
		PSF-ALB	0	34	
				157	

[87]

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
24	355	UCA-SYR	2	38	76
24	162	SYR-UCA	0	38	
31	162	SYR-UCA	1	38	38
24	262	SYR-UCA	0	38	
11	163	ITH-ROC	0	75	
		ROC-SYR	0	79	
		SYR-ITH	3	38	114
				192	114
26	268	ALB-BAF	2	69	138
		BAF-ORH	2	44	88
		ORH-BOS	2	44	88
				157	314
Total				6,180	1,090

[88]

January 3, 1954	204	EWR-BGM		140	
		BGM-ITH		32	
				172	
30	107	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
17	108	ITH-ELM	0	32	
	108	ITH-ELM	2	32	64
		ELM-BGM	1	47	47
				79	111
29	109	EWR-BGM	1	140	140
		BGM-ELM	1	47	47
		ELM-ITH	0	32	
				219	187
3	112	ITH-ELM	3	32	96
		ELM-BGM	3	47	141
		BGM-EWR	3	140	420
				219	657
2	114	ITH-BGM	0	32	
		BGM-EWR	0	140	
				172	
5	122	ITH-BGM		32	
		BGM-ALB		117	
				149	
29	23	ALB-BGM	0	117	
		BGM-ITH	0	32	
				149	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
		UCA-ART	1	68	68
20	135	ART-UCA	3	68	204
	136	UCA-ART	0	68	
17	139	ITH-BGM	3	32	96
2	150	BGM-UCA	3	71	213
		UCA-ALB	3	83	249
		ALB-PSF	3	34	102
		PSF-BAF	3	35	105
		BAF-ORH	3	44	132
		ORH-BOS	3	44	132
				343	1,029
4	162	SYR-UCA	0	38	
Total				1,995	2,256
February 12, 1954	103	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
		EWR-BGM	0	140	
1	107	BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
		EWR-BGM	3	140	420
12	107	BGM-ELM	3	47	141
		ELM-ITH	1	32	32
				219	593
		ITH-ELM	3	32	96
21	108	ELM-BGM	1	47	47
				79	143
		EWR-BGM	0	140	
4	111	BGM-ITH	0	32	
				172	
		ITH-BGM	0	32	
7	114	BGM-EWR	0	140	
				172	
14	114	Same as Trip No. 114 2-14-54	0	172	
7	122	BGM-ALB	0	117	

[89]

February 19, 1954	114	ITH-BGM	0	32	
		BGM-EWR	1	140	140
				172	140

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
22	155	ORH-BAF	0	44	
		BAF-ALB	0	69	
				113	
25	155	BOS-ORH	0	44	
		ORH-BAF	0	44	
		BAF-ALB	0	69	
				157	
7	168	ALB-BAF	3	69	207
		BAF-ORH	3	44	132
		ORH-BOS	3	44	132
				157	471
Total				1,968	1,347
March 23, 1954	105	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
26	105	Same as Trip No. 105 3-23-54	0	172	
	205	Same as Trip No. 105 3-23-54	0	172	
18	108	ITH-ELM	3	32	96
		ELM-BGM	1	47	47
				79	143
18	111	EWR-BGM	1	140	140
		BGM-ITH	1	32	32
				172	172
22	111	EWR-BGM	2	140	280
		BGM-ITH	0	32	-
				172	280
29	111	EWR-BGM	1	140	140
		BGM-ITH	0	32	
				172	140
11	111	EWR-BGM	2	140	280
		BGM-ELM	2	47	94
		ELM-ITH	2	32	64
				219	438
12	111	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
26	211	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
8	114	ITH-BGM	1	32	32
11	150	ITH-BOS	0	343	
12	155	UCA-SYR	0	38	
12	255	ALB-UCA	1	83	83
12	355	ORH-BAF	1	44	44
		BAF-ALB	2	69	138
				113	182
19	155	BOS-ALB	0	157	
26	155	BOS-ALB	0	157	
Total				2,644	1,470
April 9, 1954	101	ITH-BGM	0	32	
		BGM-ROC	0	107	
		ROC-BUF	0	55	
				194	
1	102	ITH-ELM	1	32	32
		ELM-BGM	1	47	47
		BGM-EWR	3	140	420
				219	499

[90]

April 5, 1954	102	ITH-ELM	2	32	64
		ELM-BGM	2	47	94
		BGM-EWR	2	140	280
				219	438
8	102	ITH-ELM	1	32	32
		ELM-BGM	1	47	47
		BGM-EWR	2	140	280
				219	359
23	102	ITH-ELM	1	32	32
		ELM-BGM	1	47	47
		BGM-EWR	3	140	420
				219	499
18	104	ITH-BGM	0	32	
		BGM-EWR	0	140	
				172	
29	104	BUF-SSN	0	96	
15	105	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
14	107	EWR-BGM	2	140	280
		BGM-ELM	1	47	47
		ELM-ITH	1	32	32
				219	359

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
11	108	ROC-ITH	0	75	
27	108	ITH-ELM	0	32	
2	111	EWR-BGM	3	140	420
		BGM-ELM	3	47	141
		ELM-ITH	3	32	96
				219	657
9	111	EWR-BGM	2	140	280
		BGM-ELM	2	47	94
		ELM-ITH	0	32	
				219	374
16	111	EWR-BGM	2	140	280
		BGM-ITH	1	32	32
				172	312
23	111	EWR-BGM	1	140	140
		BGM-ITH	0	32	
				172	140
23	112	ITH-ELM	0	32	
		ELM-BGM	0	47	
		BGM-EWR	0	140	
				219	
4	114	ITH-BGM	1	32	32
		BGM-EWR	1	140	140
				172	172
11	114	ITH-BGM	0	32	
4	122	ITH-BGM	0	32	
		BGM-ALB	0	117	
				149	
12	122	ITH-BGM	0	32	
		BOM-ALB	0	117	
18	122	Same as Trip No. 122 4-12-54	0	149	
11	150	ITH-BOS	0	343	
17	150	ALB-BOS	0	157	
9	155	BOS-ORH	2	44	88
		ORH-BAF	3	44	132
		BAF-ALB	3	69	207
		ALB-UCA	3	83	249
		UCA-SYR	2	38	76
		SYR-ITH	0	46	
				324	752

[91]

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
April 17, 1954	155	ALB-UCA	0	83	
23	155	BOS-ORH	3	44	132
		ORH-BAF	3	44	132
		BAF-ALB	3	69	207
		ALB-UCA	2	83	166
		UCA-SYR	1	38	38
		SYR-ITH	1	46	46
				324	721
9	163	BOS-ORH	1	44	44
		ORH-BAF	1	44	44
		BAF-ALB	1	69	69
		ALB-UCA	1	83	83
		UCA-ITH	1	71	71
		ITH-ROC	1	75	75
		ROC-BUF	1	55	55
				441	441
12	168	ALB-BAF	0	69	
Total				5,229	5,723
May 28, 1954	103	EWR-BGM	3	140	420
31	103	EWR-BGM	3	140	420
16	209	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-SSN	0	36	
		SSN-ITH	0	25	
				248	
1	111	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
31	215	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
14	204	ITH-BGM	0	32	
		BGM-EWR	0	140	
				172	

[91]

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
May 14, 1954	216	ITH-ELM	0	32	
		ELM-BGM	0	47	
		BGM-EWR	0	140	
				219	
31	135	EWR-UCA	0	179	
7	144	ITH-UCA	0	71	
7	152	UCA-ALB	2	73	146
		ALB-EEN	2	80	160
		EEN-BOS	2	83	166
				236	472
28	155	UCA-ITH	3	84	252
31	155	UCA-ITH	2	84	168
Total				2,011	1,732
June 7, 1954	101	EWR-BGM	3	140	420
		BGM-ITH	1	32	32
				172	452
14	101	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
14	103	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
9	104	ITH-BGM	0	32	
		BGM-EWR	1	140	140
				172	140
26	104	BUF-SSN	0	96	
3	105	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	

[92]

4	105	EWR-BGM	3	140	420
		BGM-ITH	3	32	96
				172	516
20	105	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
27	107	ELM-ITH	3	32	96
30	108	ITH-ELM	3	32	96
		ELM-BGM	1	47	47
				79	143
6	109	EWR-BGM	0	140	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
June 6, 1954		BGM-ITH	0	32	
				172	
11	115	EWR-BGM	3	140	420
		BGM-ITH	3	32	96
				172	516
13	115	EWR-BGM	2	140	280
		BGM-ITH	3	32	96
				172	376
20	115	EWR-BGM	0	140	
		BGM-ITH	1	32	32
				172	32
25	115	EWR-BGM	1	140	140
		BGM-ITH	0	32	
				172	140
25	215	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
27	215	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
22	144	BUF-SSN	0	96	
4	162	ROC-SSN	0	50	
Total				2,761	2,411
October 1, 1954	101	SSN-BUF	0	96	
1	201	ITH-SSN	0	25	
		SSN-BUF	0	96	
				121	
1	344	ITH-UCA	0	71	
1	301	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
2	144	ITH-UCA	0	71	
		UCA-Alb	0	83	
		ALB-BAF	0	69	
		BAF-ORH	0	44	
				267	
3	115	BGM-ITH	2	32	64
4	101	SSN-BUF	2	96	192
6	101	SSN-BUF	0	96	
7	144	BUF-SSN	0	96	
7	201	SSN-BUF	0	96	
8	201	SSN-BUF	0	96	
	118	ITH-ELM	0	32	
		ELM-BGM	0	47	
		BGM-EWR	1	140	140
				219	140

[92]

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
October 8, 1954	102	ITH-BGM	2	32	64
		BGM-EWR	3	140	420
				172	484
8	132	UCA-EWR	0	179	

[93]

10	207	EWR-BGM	0	140	
		BGM-ELM	0	47	
		ELM-ITH	0	32	
				219	
11	201	SSN-BUF	0	96	
	301	ITH-SSN	0	25	
		SSN-BUF	0	96	
				121	
12	101	SSN-BUF	0	96	
13	101	SSN-BUF	0	96	
	144	BUF-SSN	0	96	
		SSN-ITH	0	25	
				121	
15	115	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
18	101	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
	201	SSN-BUF	0	96	
20	101	SSN-BUF	0	96	
21	101	SSN-BUF	1	96	96
22	101	EWR-BGM	2	140	280
		BGM-ITH	2	32	64
				172	344
	115	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
23	155	UCA-SYR	1	38	38
		SYR-ITH	1	46	46
				84	84
26	115	BGM-ITH	1	32	32
	155	BOS-ORH	0	44	
		ORH-BAF	0	44	
		BAF-ALB	0	69	
				157	
28	131	EWR-UCA	0	179	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	RPM
October 29, 1955	107	EWR-BGM	2	140	280
		BGM-ITH	0	32	
				172	280
Total				4,158	1,716
January 2, 1955	214	ITH-BGM	0	32	
		BGM-EWR	0	140	
				172	
	163	BOS-ORH	1	44	44
		ORH-BAF	1	44	44
		BAF-ALB	1	69	69
				157	157
	314	ITH-EWR	0	172	
3	103	ITH-BUF	0	120	
	203	SSN-BUF	0	96	
	303	SSN-BUF	0	96	
	150	SSN-UCA	0	83	
		UCA-ALB	2	83	166
		ALB-PSF	1	34	34
		PSF-BAF	1	35	35
		BAF-ORH	1	44	44
		ORH-BOS	1	44	44
				323	323
	250	ITH-UCA	0	71	
		UCA-ALB	0	83	
				154	

[94]

3	403	SSN-BUF	0	96	
4	150	ELM-BGM	3	47	141
5	133	SSN-BUF	0	96	
6	111	EWR-ITH	0	172	
7	1341	SSN-BUF	0	96	
10	150	ITH-UCA	0	71	
		UCA-ALB	0	83	
		ALB-PSF	0	34	
		PSF-BAF	0	35	
				223	
	1341	SSN-BUF	0	96	
11	1341	SSN-BUF	0	96	
		BUF-SSN	0	96	
		SSN-ITH	0	25	
				121	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
January 12, 1955	150	ITH-UCA	0	71	
		UCA-ALB	0	83	
				154	
	1341	SSN-BUF	0	96	
13	1341	SSN-BUF	0	96	
	150	ITH-UCA	0	71	
		UCA-ALB	0	83	
		ALB-PSF	0	34	
		PSF-BAF	0	35	
				223	
14	1341	SSN-BUF	0	96	
	150	ITH-BGM	0	32	
		BGM-UCA	0	71	
		UCA-ALB	0	83	
		ALB-BAF	0	69	
				255	
15	107	ELM-ITH	3	32	96
17	1341	SSN-BUF	0	96	
	103	ELM-ITH	0	32	
		ITH-BUF	0	120	
				152	
	150	SSN-ELM	0	36	
		ELM-BGM	0	47	
		BGM-UCA	0	71	
		UCA-ALB	0	83	
		ALB-PSF	0	34	
		PSF-BAF	0	35	
				306	
18	161	UCA-ALB	0	83	
	1341	SSN-BUF	0	96	
	150	ITH-UCA	0	71	
		UCA-ALB	0	83	
				154	
19	1341	SSN-BUF	0	96	
	2341	ITH-BUF	0	120	
	150	SSN-BOS	0	394	
20	1341	ITH-SSN	2	25	50
21	135	EWR-UCA	2	179	358
25	2341	ITH-SSN	1	25	25
25	104	BUF-SSN	0	96	
		SSN-ITH	0	25	
				121	
28	1341	SSN-BUF	0	96	
29	1341	SSN-BUF	0	96	
30	150	ELM-BGM	1	47	47

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
January 31, 1955	1341	SSN-BUF	0	96	
	107	EWR-BGM	2	140	280
		BGM-ITH	2	32	64
				172	344
Total				5,639	1,541

[95]

May	2, 1955	255	BOS-ALB	3	144	432
	5	108	SSN-ITH	2	25	50
	6	114	ITH-BGM	3	32	96
			BGM-EWR	3	140	420
					172	516
	8	155	UCA-SYR	3	38	114
	13	210	ITH-EWR	0	172	
		110	ITH-EWR	0	172	
		155	UCA-SYR	0	38	
	15	155	BOS-ALB	0	144	
			ALB-ITH	2	136	272
					280	272
		214	BUF-ITH	0	120	
	18	104	BUF-SSN	0	96	
			SSN-ITH	0	25	
					121	
		111	EWR-BGM	0	140	
			BGM-ITH	0	32	
					172	
	19	104	BUF-SSN	0	96	
			BUF-SSN	0	96	
		204	SSN-ITH	0	25	
					121	
		111	EWR-BGM	0	140	
			BGM-ITH	0	32	
					172	
		155	UCA-SYR	0	38	
	20	104	BUF-SSN	0	96	
			SSN-ITH	0	25	
					121	
		155	UCA-SYR	1	38	38
		188	SYR-UCA	3	38	114
	21	104	ITH-BGM	0	32	
			BGM-EWR	0	140	
					172	

Date	Trip Number	Stations Served	No. of Passengers	Adjustment Miles	Adjustment RPM
May 22, 1955	107	EWR-ITH	3	172	516
23	111	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
24	101	EWR-SSN	0	197	
25	104	BUF-ITH	0	120	
27	101	ITH-SSN	0	25	
	201	ITH-SSN	0	25	
	301	BUF-SSN	0	96	
	355	ART-ITH	1	106	106
	155	UCA-SYR	1	38	38
	209	EWR-BGM	1	140	140
		BGM-ITH	1	32	32
				172	172
	163	SYR-BUF	2	133	266
	133	UCA-ART	1	68	68
	134	ART-UCA	0	68	
28	104	BUF-SSN	0	96	
	204	SSN-BUF	0	96	
		BUF-ITH	0	120	
				216	
	301	EWR-SSN	0	197	
29	132	UCA-EWR	2	179	358
30	107	EWR-BGM	0	140	
		BGM-ITH	0	32	
				172	
	155	UCA-SYR	2	38	76
31	105	SSN-BUF	0	96	
Total				4,636	3,126

December 4, 1959

Mr. Frank R. Chabot
Treasurer
Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Dear Mr. Chabot:

As requested in your letter of October 22, 1958, we are pleased to send you details of the revenue passenger miles adjustment computed by the field auditors for June 1954.

In our letter of August 19 to Mr. Carver, we indicated that two adjustments to the reported 3,750,730 revenue passenger miles for June 1954 were necessary. One adjustment reduced RPM's by 2,411 to reflect the extra section mileage adjustment; the other adjustment increased RPM's by 30,422 to correct clerical errors not related to the extra section problem.

The adjustment related to the extra section mileage adjustment, as set forth in the schedules in the August 19th letter, is believed to be self-explanatory.

With respect to the June 1954 clerical error, the field auditors, noting several significant errors while testing the passenger mile statistics, decided to examine all service for the month in detail. A comparison of the on and off count, per the carrier's origin and destination run with the computation of the through count by segments revealed a net understatement of 30,422 passenger miles, as shown on the attached tabulation.

It is our understanding that during the audit this matter was discussed with the carrier's IBM supervisor. Neither he nor the auditors could determine why so many errors developed during the IBM processing, through summary and master cards into originating, terminating and segment load runs. Apparently the processing for this month was complicated because of a schedule change effective June 7, which made it necessary to produce two sets of runs to support the final segment load run.

On the basis of the information supplied herein, it is believed you

will agree that the deduction of $1,183.74 for the period October 1, 1953 through June 30, 1954, is proper. Accordingly, unless we hear from you to the contrary, we propose to offset the latter amount against the next subsidy payment.

Sincerely yours,

/s/ John B. Russell

Chief, Office of Administration

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[104]

December 19, 1958

Mr. John R. Carver
Vice President-General Counsel
Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Dear Mr. Carver:

Reference is made to our October 14th conference on extra section mileage. It was our understanding that Mohawk intended to make a new presentation in support of its position on the extra section problem. Since we have heard nothing further from you, we are inquiring as to your plans in this regard.

Although we are reluctant to proceed without the benefit of such material as you may care to submit, in view of its long history we believe the problem should be settled without further delay. Please advise.

Sincerely yours,

/s/ John B. Russell
Chief, Office of Administration

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[105]

[Received January 22, 1959, CAB]

* * *

MOHAWK AIRLINES INC.
EXECUTIVE OFFICES:
ONEIDA COUNTY AIRPORT
UTICA, NEW YORK

January 19, 1959

Mr. John B. Russell
Chief
Office of Administration
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Russell:

Receipt is acknowledged of yours of December 19, referring to our October 14 conference on extra section mileage.

You will recall that Mohawk left that conference with the understanding that we would check our records to see if we could substantiate by actual flight logs our position that we reported extra section miles during the base period, used as a base for our final mail rate case, in the same way that we reported those extra section miles during the October 1953 - June 1955 period under consideration.

We have determined that our records for that period have been destroyed and we, therefore, do not have ability to prove our point from such records.

It is now our intention to summarize our position in the matter and we will forward to you such a communication as soon as it is prepared. Our position remains that any recapture of mail payments made for this period would be both inequitable and illegal.

Sincerely yours,

/s/ John R. Carver
Vice President

[106]

LAW OFFICES
GAMBRELL, HARLAN, RUSSELL, MOYE & RICHARDSON
SUITE 625 THE CITIZENS & SOUTHERN NATIONAL BANK BUILDING
ATLANTA 3, GEORGIA

* * * * * *

January 29, 1959

Mr. John B. Russell
Chief, Office of Administration
Civil Aeronautics Board
Washington 25, D. C.

IN RE: Colonial Mail Rates.

Dear Mr. Russell:

At the conclusion of our conference with you on November 6, 1958 you requested that we summarize in a letter Eastern's position regarding the "disallowed" extra section mileage.

From a legal standpoint, Eastern relies on the basic premise that a regulatory agency may not set rates, even "need" mail pay rates, retroactively. Transcontinental and W. Airlines, Inc. v. Civil Aeronautics Board, 336 U.S. 601 (1949); Summerfield v. Civil Aeronautics Board, 207 F. 2d 200 (D.C. Cir. 1953), aff'd, 347 U.S. 67 (1954); Capital Airlines, Inc. v. Civil Aeronautics Board, 171 F2d 339 (D.C. Cir. 1948), cert. denied, 336 U.S. 961 (1949). That rule of law was also spelled out in Section 2 of Reorganization Plan No. 10 of 1953, which provided that the rates prescribed by the Board "should supersede the initial rates from the date of the motion or petition" (emphasis added).

Eastern relies also upon the principles of justice and fair play; since the extra section operation as a whole reduced the amount of subsidy to which Colonial was entitled, it ought to be considered as in the public interest.

It is apparent from the current dispute as to what constitutes extra section mileage that, at the time the Board issued Order No. E-6999 in Colonial Airlines, Inc., Mail Rates, Domestic

Operations, 16 C.A.B. 578 (December 2, 1952), there was no precise definition of "extra section." However, in its exhibits in that case, Colonial forecast extra section mileage on the basis of actual experience and separately from scheduled mileage. Colonial's Exhibit D-1 in that case (Docket 5497) contained Colonial's forecast of operations for the twelve months ended March 31, 1953; scheduled operations were forecast by flights, and extra section operations were projected on the basis of the mileage actually flown during the base period (twelve months ended March 31, 1952). In the course of the proceeding, as statistics of experience became available, Exhibit D-1 was superseded by Exhibit J-3, which consisted of experienced operations from April 1, 1952 through August 31, 1952 and a projection of the other seven months of the forecast year. As pointed out in the attached affidavit of Colonial's President, Mr. Dykes, the April-August experience in Exhibit J-3 included substantial amounts of just exactly the type of extra section operation now being questioned.

To pursue the Exhibit J-3 data farther in the proceeding, the total plane-miles reflected and forecast in it, both regular and extra section, (shown on page 2 of the exhibit) were found by the Board to be required by one or more of the purposes of the Act (see statement by the Board at 16 C.A.B. 580 and footnote 3 on that page) and included as Appendix 4 to Order E-6999 (16 C.A.B. 591). Neither the Bureau of Air Operations nor the Board nor any one else challenged the propriety of and necessity for the extra section operations.

Regardless of whether Colonial's operations meet a later-formulated definition of "extra section," they were exactly the same as those which Colonial laid before the Board in Docket 5497 and which the Board approved. That no detailed inquiry into the nature of the extra sections, which would have developed on the record that they were operated on a regular basis to meet week-end traffic peaks, is not the fault of Colonial, which included them in its exhibits separate from regularly scheduled operations. The Board accepted the entire operation, and to attempt now to define "extra section" so as to disallow some of those flights would certainly constitute retroactive rate-making.

Furthermore, under rules and regulations of the Board during the period in question and shortly thereafter, Colonial's operations fell obviously within a reasonable definition of "extra section." For example, C.A.B. Regulation Form 41 provided: "Scheduled service means all revenue flights operated over the carrier's certificated routes pursuant to published flight schedules and all flights operated as extra sections thereto, and all non-revenue flights incident to the revenue flights so

[108]

defined" (21-37), and: "Ferry flights shall include all flights for the purpose of returning aircraft to base, equipment equalization flights, flights for the delivery of aircraft from manufacturer prior to use in line service, and flights to and from maintenance bases" (21-48). Colonial's extra section flights were not for any of the purposes listed for ferry flights; they were scheduled but unpublished, and hence they must be considered under the regulations in effect at the time as "extra sections." There is no other place for them to fit (although if their departure and arrival times had been published in the timetable instead of merely being advertised in the ticket offices, they would have been accepted without question as scheduled flights).

Standard Practice Letter No. 15, which became effective in July, 1955, shortly after the close of the period in question, indicated no change in the Board's policy respecting "extra sections." In a definition by exclusion, it prescribed: "Flights made in ferrying aircraft to meet schedules, or for similar operational reasons, are not extra sections and should be reported as non-revenue flights, even if an occasional shipment of revenue traffic is on board as a matter of special accommodation." Colonial's extra sections, advertised long in advance and operated for the specific purposes of carrying revenue passengers and meeting a public need for service at particular times, do not fall within the exclusion.

As was explained to you at the conference by Colonial's president, the operations in question were flights scheduled by Colonial to meet foreseeable peak traffic conditions, though not published in its printed

timetables. Much of Colonial's traffic was derived from week-end vacationers travelling to and from northern New York and Canada, which led to a surge of traffic northbound from New York City on Friday night and returning southbound on Sunday night. Rather than publish in its timetables flights which would operate only one day a week, Colonial, as a matter of managerial discretion, established what it termed "extra sections" as much as three months in advance of the anticipated date of operation. "Extra sections" were scheduled to depart both ahead of and behind the regular flights, and at intervals ranging up to several hours, so that the schedule of the "extra section" on a particular day might suit the convenience of a particular traveller better than the departure time of the regular flight.

With the "extra sections" set up in advance, Colonial was able to and did advertise them in its ticket offices and successfully sold many travellers passage on those flights, in both directions. The problem here is the natural one

[109]

inherent in the one-way surge of traffic. No question has been raised as to the propriety of operating the plane in the direction where it would have nearly a 100 percent load factor, but it has only been challenged in the direction where the load factor was lower due to the directional imbalance.

No matter what the flights were called, and no matter whether they were included in the printed timetables, the "extra sections" were in fact a scheduled operation within the above definitions from the Form 41 Regulation and standard Practice Letter No. 15.

As a matter of practicality and equity, whether these flights were properly called "extra sections" by Colonial or not, they were operated pursuant to a long standing plan which was subject to the Board's scrutiny and disapproval had the Board so desired. Those operations were carried on during the twelve months ended March 31, 1952, the base year in Docket 5497, and they were forecast for the year ended March 31, 1953, the forecast year in that proceeding. They were operated as expected.

[109]

As Colonial's officers advised you at the conference, those "extra section" operations were under the constant supervision of top management to make sure that they brought in revenue sufficient at least to offset direct operating costs, so that any excess over the amount would offset Colonial's indirect costs and thereby reduce its need for subsidy. The plan actually achieved that effect.

It is obvious from the sliding scale formula prescribed in Order E-6999 that the more scheduled miles flown by the carrier in extra section service, while at least maintaining on the extra sections the same load factor as in scheduled service, the greater will be factor (b) in the formula and consequently the lower the subsidy. That is a matter of simple arithmetic. (This assumes a system load factor in excess of the base load factor of 45 per cent in the rate order, which was true of Colonial's experience throughout the period.)

To point this up, had Colonial operated no extra sections during the period in question, its subsidy pay would have been substantially greater than it actually was. In the last six months of 1952 the extra section operations reduced Colonial's subsidy pay by $22,662. In 1953 the extra sections saved the Government $105,475. The subsidy bill was lowered by $63,881 and $49,429 in 1954 and 1955 respectively, and during the first three months of 1956, the saving to the Government was $14,062.

[110]

In all fairness and justness, no matter what the technicalities may be, it is grossly unfair to penalize Colonial for saving the Government money in such substantial amounts. Had its management been sloth, it would have been much simpler to avoid the sweat and strain of planning the "extra section" flights and selling enough seats on them to make them pay. It would be shocking to a sense of fair play for the Government now, ex post facto as it were, to claim the benefits of the highly profitable and moderately profitable operations and disavow those which were less profitable or which may have operated at a slight loss. Like the scheduled service, the extra section operation occasionally failed to

achieve management's expectations, but on the overall operations, Colonial did make money and did save the Government money. Justice and equity demand that the Government either accept the extra section operation in its entirety or else reject it altogether.

It should also be remembered that had the Board, in Docket 5497, determined that the half of the round trip operation carrying the light load was actually a ferry flight, the cost of that operation would have been included in Colonial's total expenses as essential non-revenue mileage. Furthermore, the passenger revenues obtained from those half round trips would have been deducted from gross non-mail revenues. The net result would have been a higher base rate of pay than the 43.50¢ prescribed in Order E-6999. Again, the proposed disallowance now of that mileage would amount to retroactive rate making.

For your information we are attaching sheets showing the passenger load factors in scheduled service and on the "extra section" operations for the period October 1953 through December 1955. You will note that in only three instances did the extra section operation lower the average load factor for the month, which was substantially offset by the fact that the extra section operation raised the average load factor in two months. As pointed out previously, as long as the system average load factor is not decreased by them, the extra sections actually save the Government money. We are also including a sheet showing the computation of the mail pay during the period July 1952 through March 1956, with and without the extra section operation.

For the purpose of supporting the factual information contained in this letter, we also are attaching the affidavit

[111]

of Mr. Branch T. Dykes, President of Colonial Airlines during the period in question, and also the affidavit of Norman D. MacDonald, its Treasurer.

Cordially yours,

Gambrell, Harlan, Russell, Moye & Richardson
Attorneys for Eastern Air Lines, Inc.

By: /s/ T. M. Forbes, Jr.

Enclosure

[Received March 10, 1959, CAB]

* * *

MOHAWK AIRLINES INC.
EXECUTIVE OFFICES:
ONEIDA COUNTY AIRPORT
UTICA, NEW YORK

March 16, 1959

Mr. John B. Russell
Chief, Office of Administration
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Russell:

By my letter of January 19, 1959, I indicated that we would summarize our position with regard to the "disallowed" extra section mileage. Since that date, we are in receipt of a copy of a letter dated January 29, 1959, addressed to you from Mr. Forbes of the firm of Gambrell, Harlan, Russell, Moye and Richardson, attorneys for Eastern Air Lines, Inc. The Eastern letter summarizes Eastern's position on the same subject with respect to the Colonial Airlines operation in the 1953-1955 period.

Colonial's operation in this period is strikingly similar to Mohawk's. It too was a smaller subsidized carrier operating in Mohawk's area with similar flight equipment and similar traffic densities in a similar market. Colonial had a substantial volume of peak traffic days and peak times during the day and a substantial amount of such peak traffic was one directional in nature. All of these facts fit the Mohawk picture during the same general period.

The factual data for Mohawk is similar to the Colonial data in all significant respects and lead inevitably to the same conclusions of fact and law as set forth in the Eastern communication.

Mohawk, therefore, adopts the position of Eastern Air Lines with respect to Colonial mail rates as its own with respect to Mohawk's mail rates. We reiterate that both as a matter of law and equity any recapture, as proposed by the Civil Aeronautics Board, cannot be sustained.

Very truly yours,

/s/ John R. Carver
Vice President

* * *

January 14, 1963

Mr. John R. Carver
Vice President
Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Dear Mr. Carver:

You will recall that the recognition for subsidy purposes of certain extra section mileage flown by the carrier during the period October 1, 1953 through June 30, 1955 has been under consideration by the Board for some time.

Initially the Board took the position that the pertinent mail rate orders should be interpreted as providing a basis for requiring that the "combined load-factor test" be met with respect to extra sections claimed for subsidy purposes. Subsequently, after considering the carriers' objections to the combined load-factor test, the Board authorized the recognition of extra sections flown with four or more passengers. By letter and attachments dated August 19, 1958, the carrier was informed that our audit covering the above period revealed that 76,667 miles were flown on extra section flights with less than four passengers, and as a result an overpayment of subsidy in the amount of $25,255.27 was indicated.

On December 27, 1962, the Board, upon reconsideration of the problem, instructed the Office of Administration to make final settlement of the outstanding extra section mileage claims of Mohawk, along with several other carriers, so as to allow extra section mileage flown with one or more passengers over some segment of the one-way trip. Analysis of the carrier's mileage reports on this basis indicates that 53,094 extra section miles were operated without any passengers and are not recognizable for subsidy purposes. The subsidy overpayment resulting from this mileage adjustment is $18,204.16. Details are shown in the attached schedule.

In accordance with the foregoing, you are advised that an offset of $18,204.16 will be made against the next regular monthly subsidy payment.

Sincerely yours,

/s/ John B. Russell
Chief, Office of Administration

Enclosures

CIVIL AERONAUTICS BOARD

MOHAWK AIRLINES, INC.

Adjustment of Subsidy Earnings
Resulting from Nonrecognition of Extra Sections without Passengers
October 1953 through June 1955

	1953			1954							
	October	November	December	January	February	March	April	May	June	July	August
1. Schedule miles flown per Form 2714	261,026	230,119	223,643	188,516	189,226	210,769	225,554	284,872	283,285	291,736	312,778
2. Extra sections without passengers	2,048	2,245	5,504	999	1,341	1,602	2,091	1,327	1,446	1,928	2,427
3. Adjusted schedule miles flown	258,978	227,874	218,139	187,517	187,885	209,167	223,463	283,545	281,839	289,808	310,351
4. Available seat miles (line 3 x 21 seats)	5,438,538	4,785,354	4,580,919	3,937,857	3,945,585	4,392,507	4,692,723	5,954,445	5,918,619	6,085,968	6,517,371
5. Revenue passenger miles	2,854,136	2,296,136	2,243,051	1,834,064	2,139,061	2,462,169	2,965,445	3,436,028	3,781,152	3,667,963	5,232,027
6. Passenger load factor (5 ÷ 4)	52.48%	47.98%	48.97%	46.58%	54.21%	56.05%	63.19%	57.71%	63.89%	60.27%	80.28%
7. Load Factor in excess of 42%	10.48%	5.98%	6.97%	4.58%	12.21%	14.05%	21.19%	15.71%	21.89%	18.27%	38.28%
8. Reduction per mile (line 7 x 90¢)	.094320	.053820	.062730	.041220	.109890	.126450	.190710	.141390	.197010	.164430	.344520
9. Amount of Reduction (3 x 8)	24,426.80	12,264.18	13,683.86	7,729.45	20,646.68	26,449.17	42,616.63	40,090.43	55,525.10	47,653.13	106,922.13
10. Base pay	118,991.95	115,153.50	118,991.95	118,991.95	107,476.60	118,991.95	115,153.50	118,991.95	115,153.50	118,991.95	118,991.95
11. Total mail pay (10 - 9)	94,565.15	102,889.32	105,308.09	111,262.50	86,829.92	92,542.78	72,536.87	78,901.52	59,628.40	71,338.82	12,069.82
12. Service mail pay	2,432.43	1,999.27	3,759.24	1,986.53	2,230.41	2,680.86	2,866.50	3,036.67	3,152.24	3,168.62	6,656.65
13. Subsidy computed	92,132.72	100,890.05	101,548.85	109,275.97	84,599.51	89,861.92	69,670.37	75,864.85	56,476.16	68,170.20	5,413.17
14. Subsidy paid	92,902.73	101,742.63	103,639.06	109,658.95	85,099.30	90,456.06	70,448.99	76,369.47	57,032.64	68,850.92	6,322.32
15. Refund due from carrier	$ 770.01	$ 852.58	$2,090.21	$ 382.98	$ 499.79	$ 594.14	$ 778.62	$ 504.62	$ 556.48	$ 680.72	$ 909.15

[114]

Mohawk Adjustment of Subsidy Earnings, Cont'd

	1954				1955						
	September	October	November	December	January	February	March	April	May	June	Total
1. Schedule miles flown per Form 2714	275,846	288,493	218,035	233,022	236,585	188,310	243,259	255,712	274,835	276,560	5,192,181
2. Extra sections without passengers	2,541	3,083	3,138	3,631	4,632	1,119	1,955	2,963	2,995	4,079	53,094
3. Adjusted schedule miles flown	273,305	285,410	214,897	229,391	231,953	187,191	241,304	252,749	271,840	272,481	5,139,087
4. Available seat miles (line 3 x 21 seats)	5,739,405	5,933,610	4,512,837	4,817,211	4,871,013	3,931,011	5,067,384	5,307,729	5,708,640	5,722,101	107,920,827
5. Revenue passenger miles	3,682,687	4,009,523	2,931,056	3,015,280	3,074,649	2,448,068	3,135,163	3,783,267	4,050,464	4,189,367	67,230,711
6. Passenger load factor (5 ÷ 4)	64.16%	66.90%	64.95%	62.59%	63.12%	62.28%	61.87%	71.28%	70.95%	73.21%	62.30%
7. Load factor in excess of 42%	22.16%	24.90%	22.95%	20.59%	21.12%	20.28%	19.87%	29.28%	28.95%	31.21%	
8. Reduction per mile (line 7 x 90¢)	.199440	.224100	.206550	.185310	.190080	.182520	.178830	.263520	.260550	.280890	
9. Amount of reduction (3 x 8)	54,507.95	63,960.38	44,386.98	42,508.45	44,089.63	34,166.10	43,152.39	66,604.42	70,827.91	76,537.19	938,748.96
10. Base pay	115,153.50	118,991.95	115,153.50	118,991.95	118,991.95	107,476.60	118,991.95	115,153.50	118,991.95	115,153.50	2,448,931.10
11. Total mail pay (10 - 9)	60,645.55	55,031.57	70,766.52	76,483.50	74,902.32	73,310.50	75,839.56	48,549.08	48,164.04	38,616.31	1,510,182.14
12. Service mail pay	3,279.64	3,480.22	2,498.94	3,548.58	2,722.68	2,606.15	3,483.60	3,298.04	3,634.21	3,731.74	66,253.22
13. Subsidy computed	57,365.91	51,551.35	68,267.58	72,934.92	72,179.64	70,704.35	72,355.96	45,251.04	44,529.83	34,884.57	1,443,928.92
14. Subsidy paid	58,299.05	52,703.92	69,346.27	74,254.40	73,896.90	71,025.49	72,706.93	45,966.15	45,357.27	36,053.63	1,462,133.08
15. Refund due from carrier	$ 933.14	$ 1,152.57	$ 1,078.69	$ 1,319.48	$ 1,717.26	$ 321.14	$ 350.97	$ 715.11	$ 827.44	$ 1,169.06	$ 18,204.16

[116]

CIVIL AERONAUTICS BOARD

MOHAWK AIRLINES, INC.

Extra Section Miles Flown Without Passengers
October 1953 through June 1955

	Total Extra Section Miles Flown	Extra Section Miles Flown Without Passengers		
		Actual	Computed[a/]	Total
October, 1953	8,795	2,048		
November	10,220	2,245		
December	15,655	5,504		
January, 1954	8,389	999		
February	7,894	1,341		
March	12,225	1,602		
April	19,220	2,091		
May	10,355	1,327		
June	8,144	1,446		
July	9,846		1,928	
August	12,394		2,427	
September	12,980		2,541	
October	13,677	3,083		
November	16,029		3,138	
December	18,543		3,631	
January, 1955	17,165	4,632		
February	5,716		1,119	
March	9,984		1,955	
April	15,131		2,963	
May	17,989	2,995		
June	20,834		4,079	
	271,185	29,313	23,781	53,094

a/ The field audit contains detailed passenger information on extra section flights for the period October 1953 through June 1954, October 1954, January and May 1955. See attachment to our letter dated August 19, 1958.

For months where audit did not contain passenger count, the same technique has been applied herein as discussed in above letter, namely:

projection of results for the periods fully audited. Thus, for the period in which actual results were available, we have determined that 19.58% or 29,313 of 149,728 extra section miles were flown without passengers. This percentage has been applied to the total extra section miles flown for months not audited as to number of passengers, to derive the computed number of zero passenger extra section miles.

[118]

[Received April 3, 1963, CAB]

* * *

MOHAWK AIRLINES INC.
EXECUTIVE OFFICES:
ONEIDA COUNTY AIRPORT
UTICA, NEW YORK

April 3, 1963

Mr. John B. Russell, Chief
Office of Administration
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Russell:

As you know, beginning in 1957 the Board has had under consideration certain extra section mileage flown (and related subsidy compensation paid) for the period October 1, 1953, through June 30, 1955, under a final mail rate ("final rate period"). Mohawk has completed its study of your latest letter of January 14, 1963, concerning this matter, the effect of which is to disallow certain extra section mileage flown by Mohawk during the final rate period.

You have also advised us of your intention to make an "offset of $18,204.16" against Mohawk's regular monthly subsidy payment to reflect the disallowance which you have proposed.

In Mohawk's view such proposed action is unlawful (1) as a retroactive revision of a final mail rate, and (2) as a completely erroneous, unreasonable, and unfair adjustment based upon a retroactive change in the "ground rules" utilized by both Mohawk and the Board during the final rate period in question.

(1) Unlawful retroactive adjustment of a final mail rate.

Mohawk contends that the proposed action is a retroactive adjustment of a final mail rate contrary to law. A regulatory agency may not set rates,

even "need" mail pay rates, retroactively. Transcontinental and W. Airlines, Inc. v. Civil Aeronautics Board, 336 U.S. 601 (1949); Summerfield v. Civil Aeronautics Board, 207 F. 2d 200 (D. C. Cir. 1953), aff'd, 347 U. S. 67 (1954); Capital Airlines, Inc. v. Civil Aeronautics Board, 171 F. 2d 339 (D.C. Cir. 1948), cert. denied, 336 U.S. 961 (1949). That rule of law was also

[119]

spelled out in Section 2 of Reorganization Plan No. 10 of 1953, which provided that the rates prescribed by the Board "should supersede the initial rates from the date of the motion or petition". (Emphasis added).

This is the position which Mohawk has continually maintained throughout the consideration of this matter.

The only indication which Mohawk has ever received as to the legal basis for the Board's action was in a letter dated August 19, 1958, from you to the undersigned in which you indicated that the proposed action was merely an interpretation of mileage language analogous to correcting "clerical discrepancies". But this clearly can no longer be the position of the Board. The instant letter comprises the third completely different standard developed for a determination of this matter -- the first in 1957, the second in 1958, and the third, the instant letter, received after a lapse of 4-1/2 years. It is obvious that the development of these "standards" involved an exercise of discretion, not present in a mere correction of clerical discrepancies. Mohawk contends that the action proposed in your letter is, in fact, not just a clerical correction but, rather, a retroactive adjustment to Mohawk's final mail rate for a period commencing almost 10 years ago based upon a standard of judgment as to allowable mileage. This, Mohawk further contends, is something that the Board is specifically barred from doing by the authorities cited above.

(2) Erroneous, unreasonable, and unfair nature of the action proposed.

Mohawk further contends that the proposed action is unlawful as a completely erroneous, unreasonable, and unfair adjustment based upon a retroactive change -- after almost 10 years -- of ground rules in being during the period in question.

a. Applicable mail rate

At the time the Board issued the order establishing the final mail rate applicable in the final rate period in question (Order E-8181), there was no precise definition of "extra section". But Mohawk will now demonstrate that the basis of that rate, approved by the Board, contemplated the practice which Mohawk had consistently followed, and which the proposed action is now trying to change retroactively some 10 years later.

The normal practice of Mohawk, of course, was that if a one-way demand developed in a market (or was foreseeable), an extra section roundtrip would be set up. In this way the "return" portion could be sold, and it might carry passengers. It was Mohawk's consistent practice to report the entire roundtrip as extra section miles. Occasionally there was a low or a zero load factor on the return trip but this was to be expected. The extra section was usually set up because of an anticipated high load factor in only one direction. In any case, this is the way Mohawk reported its extra section miles to the Board for the 12 months ending July 31, 1953.

In the conferences leading up to the establishment of the mail rate of Order E-8181, the extra section miles reported in the base year ending July 31, 1953 were used as the basis from which to forecast extra section miles for the future. Agreement on quantity was reached; the "need" of Mohawk was determined; and the Order was issued.

Accordingly, the base year extra section miles agreed to in conference were used for the future and embraced in Order E-8181. Inherent in this approach was the inclusion of roundtrip mileage where zero passenger loads could be anticipated, as experienced during the past and base period.

Therefore, regardless of whether Mohawk's operations met a 10-year-later definition of "extra section", they were exactly the same as those which Mohawk had reported to the Board, concerning which there was no dispute, and which the Board approved. During the entire period in question, there was never any change in Mohawk's method of reporting this extra section mileage. Any attempt now to redefine "extra section"

so as to disallow flights based upon such different definition would constitute retroactive rate-making.

b. Double penalty

It is obvious from the sliding scale formula prescribed in Order E-8181 that the more scheduled miles flown by the carrier in extra section service, while at the same time maintaining or increasing the over-all load factor built into the formula, the lower the subsidy would be.

This is precisely what happened here. Mohawk's experience during the period in question was a higher load factor than forecast, and thus subsidy received was less than forecast. Mohawk's extra section load factor was also higher than the base or forecast load factor and contributed to the lowering of subsidy. This is true despite the continued inclusion of all "extra sections", including those flights which may have operated with no passengers aboard.

In whatever way the matter is viewed, the action proposed in your last letter must be deemed erroneous, unreasonable, and unfair.

If viewed in terms of the overall effect, the extra sections resulted in a lower subsidy requirement than would have otherwise been the case had they not been flown. Surely, with a result like that, it is unreasonable and unfair for the Board to further reduce subsidy by a 10-year-later redefinition of extra sections so as to exclude flights which were necessary and part of the overall total of extra sections flights causing a reduction in subsidy!

Or, if viewed retroactively, if Mohawk and the Board had had before it in conference the new 10-year-later definition of extra section now proposed in your 1963 letter, Mohawk would then have removed those portions of its extra sections having a zero load factor from the forecast base, resulting in a higher load factor being built into the mail rate -- and the whole question of overpayment could never have arisen.

[122]

c. Reporting requirements

Mohawk does not object to any reasonable definition of what an extra

section is. It does strenuously object, however, to a change, after almost 10 years, of a reporting practice when the effect of the retroactivity is to reduce relied-upon subsidy.

Under rules and regulations of the Board during the period in question and shortly thereafter, Mohawk's operations fell obviously within a reasonable definition of "extra section". For example, C.A.B. Regulation Form 41 provided: "Scheduled service means all revenue flights operated over the carrier's certificated routes pursuant to published flight schedules and all flights operated as extra sections thereto, and all non-revenue flights incident to the revenue flights so defined" (21-37), and: "Ferry flights shall include all flights for the purpose of returning aircraft to base, equipment equalization flights, flights for the delivery of aircraft from manufacturer prior to use in line service, and flights to and from maintenance bases" (21-48). Mohawk's extra section flights were not for any of the purposes listed for ferry flights; they were scheduled but unpublished, and hence they must be considered under the regulations in effect at the time as "extra sections". There is no other place for them to fit (although if their departure and arrival times had been published in the timetable instead of merely being advertised in the ticket offices, they would have been accepted without question as scheduled flights).

Standard Practice Letter No. 15, which became effective in July 1955, shortly after the close of the period in question, indicated no change in the Board's policy respecting "extra sections". In a definition by exclusion, it prescribed: "Flights made in ferrying aircraft to meet schedules, or for similar operational reasons, are not extra sections and should be reported as nonrevenue flights, even if an occasional shipment of revenue traffic is on board as a matter of special accommodation".

Thus, no matter what the flights were called, the "extra sections" were in fact a scheduled operation within the above definitions from the Form 41 Regulation and Standard Practice Letter No. 15.

[123]

Mohawk respectfully submits that it reasonably interpreted the applicable rules and regulations of the Board. Never once, prior to or

during the period in question, did the Board challenge the propriety of that interpretation in audit or mail rate proceedings. Mohawk submits that, years after the conclusion of the rate period, the Board may then not assert that Mohawk has always been in error and now owes the Government money. Mohawk respectfully submits that such action falls into the category of arbitrary and unreasonable action constituting reversable error.

For all the foregoing reasons, Mohawk respectfully requests that the action proposed in your letter of January 14, 1963, be rescinded.

Very truly yours,

/s/ John R. Carver
Vice President and
General Counsel

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[124]

* * *

MOHAWK AIRLINES INC.
EXECUTIVE OFFICES:
ONEIDA COUNTY AIRPORT
UTICA, NEW YORK

April 3, 1963

The Honorable Alan S. Boyd, Chairman
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Chairman:

Mohawk Airlines, Inc., is in receipt of a letter from Mr. John B. Russell, Chief, Office of Administration, indicating that the Board intends retroactively to "disallow" certain extra section mileage performed by Mohawk under a final mail rate for a period commencing almost 10 years ago - October 1, 1953, through June 30, 1955.

The letter further states that "you are advised that an offset of $18,204.16 will be made against the next monthly subsidy payment" of Mohawk.

Mohawk has this date filed a vigorous protest with Mr. Russell

against what it considers to be an unlawful retroactive adjustment of a final mail rate. A copy of that protest is enclosed. This proposed retroactive adjustment is particularly unconscionable when it is realized that the actions now being reviewed and proposed to be reversed were based upon a previous, consistent, and continued reporting practice utilized by the Board in developing the mail rate pursuant to which Mohawk received subsidy payments, and indeed, never challenged by the Board until long after the final rate period in question.

The purpose of this letter is to respectfully and urgently request that you take appropriate action or require the Office of Administration to delay making the projected offset until such time as it has had an opportunity to consider the attached, and, in the event it denies the relief requested therein, until such time as action is taken by the Board upon an appropriate pleading filed by Mohawk with the Board seeking a review of Mr. Russell's determination, and the issuance of a final, appealable, order in this matter.

[125]

Inasmuch as Mr. Russell indicated he was acting under instructions from the Board, it seemed appropriate to direct this request to you.

Very truly yours,

/s/ John R. Carver
Vice President and
General Counsel

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[127]

[Received May 16, 1963, CAB]

May 15, 1963 B-1-34

Mr. John R. Carver
Vice President and General Counsel
Mohawk Airlines, Inc.
Oneida County Airport
Utica, New York

Dear Mr. Carver:

This will refer to your letter of April 3, 1963, addressed to Mr.

John B. Russell, Chief, Office of Administration, written in response to his letter to you of January 14, 1963, as well as your April 3 letter to me. You object to the disallowance of certain of the miles reported by Mohawk as extra section miles in the computation of its subsidy for the period October 1, 1953, to June 30, 1955. The matter was referred to the Board and upon full consideration, the Board has affirmed the position expressed in Mr. Russell's letter.

This problem arises under Order E-8181, March 24, 1954, which established a final sliding scale mail rate for Mohawk's entire system. This final rate was effective on and after August 8, 1953, and employed the usual sliding scale formula. Under the formula, the carrier's compensation was based, in part, upon the number of "scheduled miles flown." The order defined "schedule miles flown" as ". . . the direct airport-to-airport mileage between points actually served in scheduled service with DC-3 aircraft, including all trips operated as extra sections thereto."

The question at issue relates to the meaning of the term "extra section." Specifically, Mohawk contends that certain flights should be treated as "extra section" notwithstanding the fact that such flights carried no passengers. It takes the position that where a one-way demand materialized and it scheduled a "round trip" to accommodate that one-way demand with an extra section, it should be permitted to claim the total mileage as extra section miles regardless of whether the positioning flight carried any revenue passengers. Mr. Russell, in contrast, has taken the position that, for a flight to be properly considered an extra section, there must have been at least one revenue passenger carried over some segment of the one-way trip.

The term "extra sections" is not defined in the order and therefore meaning must be given to it in the light of the purpose and intent of the Board's order. The Board has always considered

that for a flight to be an extra section it must have been operated in

relation to a scheduled flight, and it must be operated for a revenue producing purpose as distinguished from an operational purpose. Flights flown for positioning or for other operational purposes are considered to be ferry flights rather than extra sections. For example, a flight flown to position an aircraft in order to operate a scheduled flight would not qualify as an extra section, and we do not understand that you contend otherwise. By the same token, the fact that extra section flights are included in the subsidy computation does not mean that positioning flights flown in connection with such extra sections are to be included in the mail pay computation.

To determine whether a particular flight has a revenue purpose and qualifies as an extra section, the test adopted is at once simple and objective, namely, whether there was in fact any revenue passenger traffic carried on the flight. It seems self-evident that a flight whcih does not carry any revenue traffic and which is not required by a schedule could not have a revenue purpose. On the contrary, the only rational explanation for such a flight is that it was performed for an operational purpose, such as the positioning of the aircraft in order to provide a revenue scheduled or extra section flight.

The foregoing reflects an objective standard for determining whether a particular flight was in fact an extra section. On the other hand, the view which you urge is basically a subjective standard under which the classification of the flight would be based upon whatever label was put upon it by the carrier. It would seem obvious that the amount of compensation payable to the carrier under a final mail rate cannot be permitted to turn upon the carrier's designation of a flight as an extra section.

The Board has consistently ruled in the case of other carriers that flights carrying no revenue traffic cannot qualify as extra section flights. This principle has been applied where, as here, the carrier attempts to combine the positioning flight with the extra section into an alleged "round trip." This interpretation was recently applied on substantially the same facts in the determination of the amount of extra section miles for Colonial Airlines, operated under Order E-6999. The fact that the

Board may have in certain cases applied a more stringent standard in certain earlier cases does not, in our view, lend any weight to Mohawk's position, since the Board has consistently refused to treat as extra sections any flight which did not carry some revenue traffic.

Mohawk's contention that under the Form 41 reporting requirements in effect during the period in question the flights could only be reported as extra section flights must be rejected. While

[129]

the usage of terminology in sliding scale mail rate orders was independent of that in the Form 41 Manual, it nevertheless appears that the miles in question should not have been reported as extra section miles under the Form 41 definition of "scheduled service." Three distinct operations were included within that definition: (1) "flights operated over the air carriers certificated routes pursuant to published flight schedules;" (2) "flights operated as extra sections thereto;" (3) "all non-revenue flights incident to the revenue flights so defined." Since the flights in question were in fact non-revenue flights and, as previously indicated, could only have been performed for operational rather than traffic purposes, they should have been reported under category (3), i.e., "all non-revenue flights incident to the revenue flights so defined." In other words, the flights in question were clearly ferry flights incident to extra sections and should not have been reported as extra sections proper.

In contending that the Board's interpretation of "extra sections" is erroneous, you claim that it would produce inequitable results for Mohawk. That position is premised on two bases: (1) zero load factor extra section miles were included in the base year figures upon which Mohawk's rate was constructed causing the rate to be erroneously computed at a lower figure than would have been the case had such miles been excluded; and (2) Mohawk's extra sections obtained high load factors which actually reduced its subsidy payment.

Turning first to the fact that Mohawk erroneously included zero load factor extra section miles in its base year figures, it is of course

regrettable that the carrier made this error. However, the carrier's reporting practices were its own doing and were without knowledge on the part of the Board or its staff. The fact that Mohawk's final rate may have been based upon an incorrect assumption as to the number of extra section miles operated by the carrier is not a matter of which we may take cognizance at this date. Since that rate order is a final order for all purposes, we cannot undertake a partial reopening in the guise of an interpretation.

However, even judging the matter from the standpoint of the equities we see no occasion for relief. It is true that if zero load factor miles were mistakenly included in Mohawk's base year figures, exclusion of such miles in the computation of its subsidy payment under the final rate would probably result in less mail pay to Mohawk than if such miles had been excluded from the very beginning.

[130]

On the other hand, we have noted that only 73,992 extra section miles were projected for the first year under the final rate while in fact Mohawk flew over 50 per cent more extra sections or 120,579 miles. It may be assumed that the positioning flights increased in the same proportion. Under these circumstances, to include the zero flights as extra sections would result in Mohawk's receiving more mail pay than it would have received had the zero extra sections been identified and excluded from the original mail rate.

The fact that Mohawk's extra sections obtained high load factors and reduced its subsidy payment is hardly a reason for departing from the Board's established interpretation of its rate orders. Indeed, it is to be expected that an efficient carrier would operate extra sections only when the traffic demands would warrant the flights.

In view of the foregoing, the Board has determined to disallow those claimed extra section miles on which no passengers were carried in the computation of Mohawk's subsidy as outlined in Mr. Russell's letter of January 14, 1963. Accordingly, we intend to make an off-set of $18,204.16 against your next regular monthly subsidy payment.

Sincerely yours,
/s/ Alan S. Boyd, Chairman

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[131]

[131]

REPORTING PROCEDURES

SCHEDULE C - QUARTERLY FLIGHT AND TRAFFIC STATISTICS

SCHEDULE C-1 - MONTHLY FLIGHT AND TRAFFIC STATISTICS

General Instructions

Schedule C is designed for the reporting of flight and traffic statistics by primary and secondary classes of service and by types of aircraft for each calendar quarter.

Schedule C-1 is designed for the reporting of total flight and traffic statistics in all services and separately for scheduled and nonscheduled services with only a partial separation by aircraft type and class of service.

The amounts reported in these schedules shall represent the total for both owned and rented aircraft, with no separation being required between the data for owned and rented units.

All mileage data shall be based upon direct airport-to-airport distances as distinguished from course-flown distances.

Scheduled service means all revenue flights operated over the air carrier's certificated routes pursuant to published flight schedules and all flights operated as extra sections thereto, and all nonrevenue flights incident to the revenue flights so defined.

Nonscheduled service means all revenue flights which cannot be classified as scheduled services, and all nonrevenue flights incident to such flights.

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[135]

Item Definitions and Instructions

Aircraft Miles

Line 1, Passenger, property and United States mail - regular trips, shall be used for reporting the aircraft miles flown on regular trips of scheduled passenger flights which are designated to carry United States

mail, whether or not mail is carried on such flights.

Line 2, Passenger, Property and United States mail - extra sections, shall be used for reporting the aircraft miles flown on extra sections of scheduled flights which are designated to carry United States mail, whether or not mail is carried on such flights.

[136]

Line 3, Property and United States mail only - regular trips, shall be used for reporting the aircraft miles flown on regular trips of scheduled cargo flights which are designated to carry United States mail, whether or not mail is carried on such flights.

Line 4, Property and United States mail only - extra sections, shall be used for reporting the aircraft miles flown on extra sections of scheduled cargo flights which are designated to carry United States mail, whether or not mail is carried on such flights.

Line 5, Passenger and property only, shall be used for reporting the aircraft miles flown (1) on regular trips and extra sections of scheduled passenger flights which are not designated and scheduled to carry United States mail, and (2) on those flights in nonscheduled service transporting passengers.

Line 6, Property only, shall be used for reporting the aircraft miles flown (1) on regular trips and extra sections of scheduled all cargo flights which are not designated and scheduled to carry United States mail, and (2) on those flights in nonscheduled service transporting cargo only.

Line 7, Nontransport, shall reflect the revenue aircraft miles performed in nonscheduled operations on flights on which no mail, passengers or property are transported. The flights to be reported on this line are those relating to such services as aerial photography, advertising, dusting operations, etc. Data for this line shall be reported only on the pages for "All Services" and "Nonscheduled" services.

Line 9, Nonrevenue miles. The aircraft miles reported on this line shall represent the miles performed on the nonrevenue flights for which the aircraft hours are reported on lines 35 to 38, inclusive.

[136]

Passenger Traffic

Line 11, Number of revenue passengers carried. This item shall be reported only on those pages of Schedules C and C-1 covering "All Services", "Total Scheduled Services", and "Total Nonscheduled Services" and on the page of Schedule C-1 covering "Coach and Tourist Service". The figures reported on line 11 shall represent an unduplicated count of revenue passengers for each operation for which separate reports are filed. Transfer passengers between separate operating units within each reporting unit shall be eliminated, but lay-over passengers shall be included. Those passengers transported at full published fares and also those carried at reduced fares shall be calssified as revenue passengers, but infants carried at a small fraction of the regular fares shall not be so classified.

Line 12, Revenue passenger-miles (in thousands);

[137]

Line 13, Nonrevenue passenger-miles (in thousands). "Passenger-miles" is defined as the miles flown per each interstation trip multiplied by the number of passengers carried on that trip. Nonrevenue passenger-miles refers to nonrevenue passengers carried on revenue flights. "Non-revenue passengers" means persons transported without charge including company employees. For purposes of computing passenger-miles, infants not occupying a separate seat and carried without charge or at a small fraction of the regular fares shall not be included either as revenue or nonrevenue passengers. Passengers carried at reduced fares shall be included as full passengers.

Passenger-miles shall be rounded to the nearest thousand for each type of aircraft and the "000" shall be omitted. The amount shown in each total page shall be the sum of the amounts reported in the supporting detail pages.

Seat-Miles and Load Factor

Line 15. Available seat-miles operated (in thousands) is defined

as the miles flown per each interstation trip multiplied by the number of seats available on that trip for the carriage of passengers (as distinguished from the rated passenger-carrying capacity of the aircraft). Available seat-miles shall be rounded to the nearest thousand for each type of aircraft and the "000" shall be omitted. The amount shown in each total page shall be the sum of the amounts reported in the supporting detail pages.

Line 16. Revenue passenger load factor is defined as the quotient obtained by dividing the revenue passenger-miles (line 12) by the available seat-miles operated (line 15). Each quotient shall be carried to two places beyond the decimal point, such as 80.46.

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[139]

Operating Performance Factor

Line 29. Scheduled miles is defined as the sum of the direct airport-to-airport distances of all flights scheduled to be performed during the month over the air carrier's certificated routes in pursuance of published flight schedules. Scheduled miles shall be reported in total only on those pages of Schedule C-1 covering "All Services" and "Total Scheduled Services," and shall reflect the flight patterns as set forth in the published schedules. Flights listed in the published schedules for operation only as extra sections when the traffic demands shall be excluded. In computing scheduled miles, stations scheduled as fuel stops or flag stops shall be considered as if such stations were scheduled as regular traffic stops. The scheduled miles relating to flights scheduled to begin in one month and terminate in the next shall be included in the month in which the flight is scheduled to depart, provided that such flights in international services shall not be considered to extend beyond the first crew change.

[140]

[140]

Line 30 Scheduled miles flown is defined as the aircraft miles performed on flights for which the scheduled miles are reported on line 29. Scheduled miles flown shall be reported in total only on those pages of Schedule C-1 covering "All Services" and "Total Scheduled Services," and shall not include any miles performed on extra-section flights. The miles performed on flights scheduled to begin in one month and terminate in the next shall be included in the month in which the flight is scheduled to depart, provided that such flights in international services shall not be considered to extend beyond the first crew change. This applies to flights delayed because of weather, mechanical failure or similar reasons. The scheduled miles for such delayed flights shall have been properly reported on line 29 of the report for the same month.

Line 31 Percentage completed shall be obtained by dividing the scheduled miles flown (line 30) by the scheduled miles (line 29). The quotient shall be carried to two places beyond the decimal point, such as 97.56.

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[142]

Aircraft Hours

Aircraft hours shall be computed from the time the plane becomes airborne on take-off to the time of ground contact upon landing. Minutes or fractional hours shall not be shown in reporting aircraft hours flown.

Line 34 Revenue hours, shall reflect the aircraft hours relating to flights for which the aircraft miles are reported on lines 1 to 7, inclusive.

Nonrevenue hours:

Line 35 Ferry flights shall include all flights for the purpose of returning aircraft to base, equipment equlization flights, flights for the delivery of aircraft from manufacturer prior to use in line service, and

flights to and from maintenance bases.

Line 36 Personnel training flights shall include all flights for the purpose of obtaining flying time for pilot personnel as well as ordinary flights in connection with flight personnel training programs. This item shall also include all flights for the purpose of permitting pilot personnel to familiarize themselves with the route or routes over which they will fly. Flights in connection with training programs for others shall not be reported herein.

Line 37 Extension and development flights shall include all flights for the purpose of surveying proposed extensions of the air carrier's routes, or proposed new routes.

Line 38 Other nonrevenue flights shall include all nonrevenue flights not reported on lines 35, 36 or 37.

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[143]

CIVIL AERONAUTICS BOARD
Washington 25

October 1, 1953

To: All Air Carriers Certificated to Carry Mail

Subject: Claims for Mail Pay Other Than Service Mail Pay

This letter is to advise air carriers concerned of the precedures to be followed in obtaining payment of that portion of their total mail compensation which is in excess of service mail pay to be received from the Post Office Department pursuant to Reorganization Plan No. 10 of 1953, a copy of which is attached as appendix No. 2 to the Board's Order E-7721, adopted September 16, 1953.

Under the Plan, the Post Office Department is responsible for paying the total mail compensation due for operations conducted through September 30, 1953, and for operations after that date, will make payments for service mail pay only. The Board will be responsible for paying mail pay other than service pay with respect to operations performed on and after October 1, 1953.

To carry out its payment functions under the Reorganization Plan, the Board has established in the Budget and Fiscal Section of the Secretary's Office, a Carrier Payments Unit which will certify payments (checks will actually be written by the Treasury Department) on the basis of a review and verification of claims and supporting documents submitted by the carriers and of information provided by the Post Office Department. The Audits Section, in the Bureau of Air Operations, will conduct field postaudits of the carriers' records supporting its claims normally as an additional item in its regular audit program. In order that these audits may be performed with the minimum inconvenience to both the carriers and the Board, it will be of utmost importance that all basic records relating to mail service and traffic volume and load factor statistics be preserved by the carriers in readily accessible form until after the field audit has been accomplished.

There is attached "Carrier Payments Memorandum No. 1" setting forth interim instructions for the preparation and submission of claims and supporting documents. The use of existing Post Office Department instructions and forms is being continued temporarily, with certain modifications explained in the accompanying

Memorandum. Revised or additional instructions will be issued in the form of consecutively numbered "Memoranda". Ultimately, the Board's basic procedures and instructions with respect thereto, will be incorporated in its formal regulations.

The interim procedures provide for the monthly submission of a claim for payment on Post Office Department Form 2703 supported by Post Office Department Form 2714, or in the case of international operations, Form 2901, such forms to be submitted in an original and one copy. In order that payments may be made with a minimum of delay after the performance of the service to which they relate, a substantial percentage of each carrier's claim will continue to be advanced prior to

complete office audit of the account. In those cases where carriers have urgent need for earlier partial payment than the above procedure provides, they may request partial payment on the basis of an estimated claim submitted in an original only, on Post Office Department Form 2703.

Questions concerning the Board's payment procedures should be addressed to the Civil Aeronautics Board, Attention: Chief, Budget and Fiscal Section. On October 16, 1953, a staff conference will be held in room E-210, Temporary 5 Building, at 10:00 a.m., to review preparations with respect to payments to carriers for operations performed on and after October 1, 1953. Although under no obligation whatever to attend, carrier representatives are welcome to do so if they desire.

/s/ M. C. Mulligan
Secretary

Attachment

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[145]

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Carrier Payments
Memorandum No. 1

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II. Claim for Payment.

A. Claims for payment of the amounts due from the Civil Aeronautics Board will be made by filing, in duplicate, executed Post Office Department Form 2703, supported by the appropriate detailed records, i.e., in the case of international operations, Post Office Department Forms 2901, "Record of Flight Operation and Miles of Service Performed"; and for all other operations, Post Office Department Forms 2714, "Daily Flight Record and Statement of Air Mail Service Performed". Claims and supporting papers should be forwarded to the Civil Aeronautics Board, Attention: Chief, Budget and Fiscal Section.

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[146]

C. Preparation of Post Office Department Form 2714, "Daily Flight Record and Statement of Air Mail Service Performed".

1. Post Office Form 2714 "Daily Flight Record and Statement of Air Mail Service Performed" will be prepared in accordance with Post Office Department instructions in effect prior to October 1, 1953. Each Form 2714 will cover a single flight for one calendar month.

2. Any variation shown on Form 2714 from the scheduled mileage must be fully explained either in the "Remarks" column or by notations, properly cross-referenced to the appropriate entry, on a separate page. Failure to provide clear and complete explanation will require an exchange of correspondence which will increase the workload of both the C.A.B. and the carrier and may delay settlement of the claim.

3. Separate entries will be made on the last three lines, or on a separate Form 2714, for all extra section and other revenue flights serving as a basis of the claim.

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[149]

CIVIL AERONAUTICS BOARD
Washington 25

Reorganization Plan No. 10
Field Audit Practice

INSTRUCTION LETTER NO. 1

October 13, 1953

TO:

To provide the basis for field audit of carriers receiving subsidy payments pursuant to Reorganization Plan No. 10, and to meet certain requirements of the General Accounting Office, it is requested the following information with respect to revenue miles, revenue passenger miles, and load factors be filed with the Board:

1. Revenue Miles Flown Data

An explanation is required of procedures and methods used in gathering, compiling, and computing revenue miles flown as reported on monthly Schedule C-1 of Form 41. This explanation should set forth the sequential steps in the process, including basic documents, forms, and work sheets used, and the extent of internal controls and checks made to insure correctness of final results. The explanation should also include a detailed description of procedures used for authorizing extra sections of regular flights and the methods used to correct flight irregularities, such as overflys and off-route stops. Subsequent changes and modifications should be reported prior to their effective dates.

The above explanation, when received, will be considered by the Board to be the actual procedures and methods in use by the carrier, and will be subject to check and verification by the Board auditors during their examination.

2. Revenue Passenger Miles and Load Factor Data

In addition to the information required under Item 1 above, carriers receiving subsidy payments under a sliding scale mail rate formula are requested to detail in sequential order the methods, procedures, basic documents, forms, work sheets, etc., used in the development of revenue passenger miles and revenue

[150]

passenger load factors as reported monthly on Schedule C-1 of Form 41. Particular attention should be given to explaining internal controls and checks made during the process of gathering, compiling, and computing to insure consistency and accuracy of final results as reported. Subsequent changes and modifications should be reported prior to their effective dates.

The above explanation when received will be considered by the Board to be the actual procedures and methods in use by the carrier, and will be subject to check and verification by the Board auditors during their examination.

With respect to Items 1 and 2 above, it will not be necessary to furnish copies of forms used, but the statements should clearly identify the basic documents and other forms, and their use in connection with processing of the data.

Detail of Statistical Summaries:

To facilitate the audit of statistical information under Items 1 and 2 above, and since the examination will be on a testcheck basis, it is necessary that the statistics be compiled in such fashion as to show the data by flights and by days with appropriate sub-totals which will comprise the final results. In this connection recent audits have indicated some carriers are producing a single monthly total by IBM process with no breakdown of the data by trips or by days. Obviously, the selection of certain trips or days for test checking would be impossible from the single total result.

With regard to extra sections operated in connection with regular flights, it will expedite the examination if separate tabulations can be made of these flights. Part of the audit will include verification of extra section flights.

Retention of Basic Records

In order that the subsidy payments verification can be performed with the least inconvenience to both the carriers and the Board, it will be necessary that all basic records relating to the gathering, compiling, and production of revenue miles flown, revenue passenger miles, and load factors be preserved in readily accessible form until the field audit for the period then under review has been completed. Inadequate, incomplete, or misplaced basic records could result in considerable inconvenience and possible financial loss to the carrier if the data available to our auditors are unsuitable for verification purposes.

[151]

Your early attention to the filing of statements requested in Items 1 and 2 above will be appreciated.

The statements and any inquiries with respect to them should be addressed to the Civil Aeronautics Board, Bureau of Air Operations, Washington 25, D.C., Attention: Chief, Accounting and Statistics Division.

/s/ Warner H. Hord

Chief, Accounting and Statistics Division
Bureau of Air Operations

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[152]

CIVIL AERONAUTICS BOARD
Washington, D.C.

Accounting and Reporting
STANDARD PRACTICES LETTER
NO. 15

To: Chief Accounting Officers
All Scheduled Air Carriers

Subject: Compilation of Mileage Statistics

The following instructions are issued in view of the number of inquiries received concerning the procedure for compiling revenue aircraft miles in scheduled service, to be reported on lines 1 to 8 of quarterly Schedule C and on line 8 of monthly Schedule C-1.

Revenue miles in scheduled service should consist of the sum of distances between airport stops on each revenue trip (including extra sections) operated pursuant to flight schedules filed with the Civil Aeronautics Board, including the distances to any additional stops either on line or off line, required in connection with the performance of such schedules. All such distances should be stated in terms of direct airport-to-airport mileage.

There are so many different kinds of flight irregularities that it is not possible to set forth specific reporting instructions that can be applied to all situations. There are outlined below, however, procedures which should be followed generally in the classification of aircraft miles on most common types of flight irregularities.

[152]

1. The following are types of flight irregularities that should generally be included when compiling revenue aircraft miles in scheduled service:

a. Flight terminates at off-line airport. Include in revenue miles the distance to the off-line airport, whether beyond or short of scheduled terminal.

b. Flight skips one or more intermediate scheduled stops (other than flag stops) but reaches scheduled terminal point, or flight terminates at an off-line station. Compute mileage on the basis of stops actually made and do not include mileage to points skipped.

c. Flight by-passes one or more intermediate flag stops. If flag stops are by-passed, compute mileage without these stops. Flag stops should be taken into account only when the flight is operated to or over the flag stop.

[153]

d. Flight makes all scheduled stops and also stops at on-line intermediate points not scheduled. Include in revenue miles the distance to non-scheduled stops.

e. Extra section flight. Extra section flights are those operated to accommodate overflow traffic from regularly scheduled flights and should be reported as revenue miles in scheduled service. Flights made in ferrying aircraft to meet schedules, or for similar operational reasons, are not extra sections and should be reported as non-revenue flights even if an occasional shipment of revenue traffic is on board as a matter of special accommodation.

2. The following are types of flight irregularities that should generally be excluded when compiling revenue aircraft miles in scheduled service:

a. Flight returns to last point of departure. Miles flown should be reported as non-revenue miles, determined by multiplying normal cruizing speed for the aircraft type by the airborne hours.

b. Flight operated for the purpose of ferrying aircraft to meet schedules. Such flights should be classified as nonrevenue flights even if an occasional shipment of revenue traffic is on board as a matter of special accommodation.

We recognize that these interpretations might vary in some respects from instructions issued to certain carriers from time to time in the past. However, in order to bring about uniformity in reporting, all air carriers are requested to comply with these instructions in computing aircraft miles flown and related passenger-miles, available seat-miles, traffic ton-miles and available ton-miles effective with reports filed for the month of July 1955.

Very truly yours,

/s/ Warner H. Hord

Chief, Office of Carrier Accounts
and Statistics

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mohawk Airlines, Inc., Petitioner,	)	
v.	)	No. 17986
Civil Aeronautics Board. Respondent.	)	

PETITION OF MOHAWK AIRLINES, INC., FOR REVIEW OF ORDER OF THE CIVIL AERONAUTICS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia:

Mohawk Airlines, Inc., presents this petition for judicial review of an order of the Civil Aeronautics Board, attached hereto as an

Appendix, and in support thereof respectfully represents and alleges as follows:

I. NATURE OF THE PROCEEDINGS

1. By virtue of Order E-8181, March 24, 1954, the Civil Aeronautics Board established a final mail rate to be paid to Petitioner for the transportation of mail on its entire system on and after August 7, 1953.

2. Following a review by Respondent's field auditors of Petitioner's statistical procedures and data in July 1955 for the period from October 1, 1953 to June 30, 1954 and again in May 1956 for the period from July 1, 1954 to June 30, 1955, Respondent informed Petitioner by letter dated October 25, 1957, approximat ely a year and a half after the last of the above audits, that it was considering disallowing certain extra section mileage performed by Petitioner in the computation of subsidy already paid to Petitioner under the aforesaid final mail rate for the period from October 1, 1953, through June 30, 1955.

3. By letter dated November 25, 1957, Petitioner replied to Respondent stating that it considered the proposed recapture of subsidy paid to it under a final mail rate to be an illegal retroactive adjustment of that final mail rate. Over the years, there ensued an exchange of correspondence and views during which Petitioner steadfastly reiterated its position as to the illegality of the action proposed by Respondent. During the course of these negotiations, Respondent several times redefined the term "extra section mileage". The definition under which Respondent first proposed a recapture of sums already paid under the final mail rate in effect from October 1, 1953 through June 30, 1955, was first communicated to Petitioner in Respondent's letter of October 25, 1957, and was admittedly first formulated by Respondent no earlier than during the course of conducting the aforesaid field audits. This definition was not in effect, let alone applied, during the period when Petitioner's final mail rate was being formulated. Said rate had been computed, inter alia, on the basis of a different definition of extra section mileage which Petitioner had followed consistently in its reports to Respondent before, during, and after said mail rate was established.

4. The negotiations between Petitioner and Respondent culminated in the final order attached hereto as an Appendix. This order is in the form of a letter dated May 15, 1963, from Respondent to Petitioner and concludes:

> "In view of the foregoing, the Board has determined to disallow those claimed extra section miles on which no passengers were carried in the computation of Mohawk's subsidy as outlined in Mr. Russell's letter of January 14, 1963. Accordingly, we intend to make an off-set of $18,204.16 against your next regular monthly subsidy payment."

5. Pursuant to this order, Respondent has in fact made the aforesaid off-set from the April 1963 subsidy payment to Petitioner paid on May 28, 1963. It is this order of May 15, 1963, of which Petitioner seeks review and reversal.

II. FACTS UPON WHICH VENUE IS BASED

1. Petitioner, a corporation duly organized and existing under the laws of the State of New York, is an air carrier holding certificates of public convenience and necessity, issued by Respondent, authorizing it to engage in air transportation and foreign air transportation as those terms are defined in the Federal Aviation Act of 1958, as amended.

2. This petition is filed pursuant to Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486 and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009. It seeks review of the order of Respondent dated May 15, 1963, attached hereto as an Appendix.

3. Petitioner has a substantial interest, within the meaning of Section 1006 of the Federal Aviation Act, in the aforesaid order. Petitioner also has suffered a legal wrong and is adversely affected or aggrieved by virtue of that order, Section 10(a) of the Administrative Procedure Act. Pursuant to that order, Respondent has off-set the sum of $18,204.16 from the subsidy payment to Petitioner for the month of April 1963, paid on May 28, 1963.

4. The order of Respondent is a final one since the action proposed therein has been taken already and Petitioner has exhausted its remedies before Respondent.

III. THE GROUNDS UPON WHICH RELIEF IS SOUGHT

1. Respondent's Order of May 15, 1963, is unlawful and should be set aside by the Court on the grounds that the Respondent illegally has reduced retroactively the amount of subsidy paid to Petitioner under a final mail rate, based on Respondent's retroactive interpretation of the term "extra section mileage", in violation of Section 406 of the Federal Aviation Act of 1958, 72 Stat. 763, 49 U.S.C. 1376. Said rate was established on the basis of a different interpretation of the same term consistently followed by Petitioner in its reports to Respondent before, during, and after said mail rate was established. The retroactive interpretation of the term "extra section mileage" was made long after the sums due under the rate had been paid to Petitioner.

2. The action taken by Respondent pursuant to its Order of May 15, 1963, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioner prays (1) that a copy of this Petition be served upon Respondent, and that a transcript of the record upon which the order here in question was entered be certified and filed by the Respondent in this Court, in accordance with Section 1006 (c) of the Federal Aviation Act; (2) that this Court review Respondent's order of May 15, 1963; (3) that upon such review this Court set aside said order, and (4) that Petitioner have such further and different relief as this Court may deem proper.

Respectfully submitted,

POGUE & NEAL

/s/ Calvin Davison
Attorneys for Petitioner

* * *

July 15, 1963

[Certificate of Service]

CERTIFICATION IN LIEU OF CERTIFICATION OF TRANSCRIPT OF RECORD

Petitioner here seeks review under section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486, as an "order", of a letter from the Civil Aeronautics Board to petitioner, dated May 15, 1963, interpreting the Board's earlier Order E-8181.

IT IS HEREBY CERTIFIED that the annexed index is a list of documents and materials in the possession of the Board relating to its Order E-8181 and its letter to petitioner dated May 15, 1963. Part I comprises all the documents and materials on the basis of which was entered the aforesaid Order E-8181. Part II comprises the correspondence exchanged between the parties since the start of the present controversy and relating thereto. Part III comprises certain other materials, not included in the foregoing, which it is believed may assist the Court in its consideration of the petition for review herein.

This list is filed in lieu of transmitting the foregoing documents and materials, which are being retained by the Board for and on behalf of the Clerk and subject to his orders, as provided by Rule 38 of the Rules of the Court.

HAROLD R. SANDERSON
Secretary

Dated: October 18, 1963

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of the Court, the parties, subject to the approval of the Court, hereby stipulate and agree as follows wilth respect to the issues and with respect to the contents of the joint appendix:

I.

Issues

The petition for review herein seeks review of a letter from the Chairman of the Civil Aeronautics Board to Petitioner, dated May 15, 1963, stating the Board's final position and proposed action in a controversy over the propriety of the inclusion of certain flight mileage in the computation of Petitioner's subsidy mail pay for the period from October 1, 1953 to June 30, 1955. In its letter, the Board took the position that certain flights, which Petitioner had designated as "extra sections" in its reports to the Board, were not legitimate "extra sections" within the meaning of Order E-8181, which fixed Petitioner's subsidy mail rate for the period in question, because they carried no passengers. The Board in its letter concluded that Petitioner had consequently been overpaid for the period in question, and notified Petitioner that the sum of $18,204.16 would accordingly be withheld from the next monthly subsidy payment otherwise currently due Petitioner. The withholding in fact took place on May 28, 1963.

The issues are as follows:

1. Whether Respondent's action set forth in its letter of May 15, 1963, constitutes a prohibited retroactive adjustment of Petitioner's final mail rate?

2. Whether Respondent's action set forth in its letter of May 15, 1963, is arbitrary, capricious and an abuse of discretion under the circumstances of this case?

3. Whether Respondent's letter constitutes an order subject to review by this Court?

Respondent reserves the right to contend that any specific matter

urged by Petitioner in support of its contentions is not properly before the Court.

II.

Joint Designation of Materials
To Be Printed In Joint Appendix

The joint appendix shall contain the following materials and shall be filed by November 20, 1963:

It is further agreed that any party, in brief or at the hearing in the case, may refer to and rely upon any portion of the materials listed in Respondent's "Certification In Lieu Of Certification Of Transcript Of Record" which has not been printed to the extent that such portion may be material to the issues, it being understood that any portions of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

III.

Further Procedures And Filing Dates

The time for filing briefs shall be governed by Rule 18 of the Court's rules.

/s/ Calvin Davison
Attorney for Petitioner

/s/ O. D. Ozment
Attorney for Respondent

November 7, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,986 September Term, 1963

Mohawk Airlines, Inc. v. Civil Aeronautics Board

Before: Fahy, Circuit Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38 (k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: Nov. 14, 1963.

261

BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,986

MOHAWK AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition For Judicial Review Of An Order Of The Civil Aeronautics Board

CALVIN DAVISON
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STATEMENT OF QUESTIONS PRESENTED

1. Whether Respondent's off-set of $18,204.16 from mail pay otherwise due Petitioner on the grounds stated in its letter of May 15, 1963, constitutes a prohibited retroactive adjustment of Petitioner's final mail rate?

2. Whether Respondent's action set forth in its letter of May 15, 1963, is arbitrary, capricious and an abuse of discretion under the circumstances of this case?

3. Whether Respondent's action taken pursuant to its letter of May 15, 1963, is subject to review by this Court?

INDEX

CITATIONS

Cases:

Statutes:

* Cases or authorities chiefly relied upon.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,986

MOHAWK AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition For Judicial Review Of An Order Of The Civil Aeronautics Board

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BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

Petitioner is an air carrier holding certificates of public convenience and necessity, issued by Respondent, authorizing it to engage in air transportation and foreign air transportation as those terms are defined in the Federal Aviation Act of 1958, as amended.

Petitioner seeks review of an order of Respondent issued in letter form and dated May 15, 1963, whereby Respondent ordered the offset of $18,204.16 from a sub-

sidy mail payment otherwise due Petitioner. This off-set was due to Respondent's retroactive disallowance of certain extra section miles in the computation of the subsidy paid to Petitioner for the period October 1, 1953, through June 30, 1955, under the final mail rate then in effect for Petitioner. The petition for review herein was filed on July 15, 1963. (J.A. 109).

Respondent filed a motion to dismiss the petition herein on September 6, 1963. Petitioner answered in opposition to that motion on September 25, 1963. This Court denied Respondent's motion to dismiss on October 10, 1963, without prejudice to Respondent's right to renew the motion when the case was heard on the merits.

The jurisdiction of this Court is invoked under Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. § 1486, and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009.

STATEMENT OF THE CASE

By Order E-8181, dated March 24, 1954, the Civil Aeronautics Board established a final subsidy mail rate to be paid to Petitioner for the transportation of mail on its entire system for the period here in question, October 1, 1953, through June 30, 1955, which was intended to meet the need of Petitioner for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of Petitioner to enable Petitioner under honest economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. This rate was made effective for the period on and after August 7, 1953, and continued in effect until June 30, 1955. The rate thus covered both a past and a future period.

Order E-8181 provided that the scheduled miles flown should be computed on the direct airport-to-airport mileage between points actually served on each trip flown in scheduled service with DC-3 aircraft, "including all trips operated as extra sections thereto." (J.A. 31). The mileage flown was relevant to the amount of subsidy paid to Petitioner under the aforesaid final mail rate order.

Respondent's field auditors reviewed Petitioner's statistical procedures and data in July of 1955, for the period from October 1, 1953, through June 30, 1954. A similar review was made in June of 1956, for the period from July 1, 1954, through June 30, 1955. Based on information developed in such reviews, Respondent informed Petitioner by letter dated October 25, 1957, that it was considering disallowing certain extra section mileage performed by Petitioner in the computation of subsidy already paid to Petitioner under the aforesaid final mail rate for the period from October 1, 1953, through June 30, 1955, based on a definition of extra section mileage set forth for the first time in that letter. (J.A. 40).

By letter dated November 25, 1957, Petitioner replied to Respondent that it considered the proposed recapture of subsidy paid to it under a final mail rate based on this new definition of extra section mileage to be an illegal retroactive adjustment of that final mail rate. (J.A. 42). Over the years, there ensued an exchange of correspondence and views, during which Petitioner reiterated its position as to the illegality of the action proposed by Respondent. During the course of these exchanges, Respondent *twice* redefined the term extra section mileage in a manner different from its definition set forth in its letter of October 27, 1957. (J.A. 46, 81).

The negotiations between Petitioner and Respondent culminated in Respondent's final order in the form of a letter dated May 15, 1963, from Respondent to Petitioner, pursuant to which Respondent off-set the sum of $18,-

204.16 against subsidy payments otherwise due Petitioner. (J.A. 91).

Extra section mileage was *not* defined, other than as quoted above, in Order E-8181 which set Petitioner's final subsidy mail rate for the period in question. Therefore, in reporting such mileage for payment purposes under that rate and for all other purposes, Petitioner continued its previous practice of reporting as extra section mileage, roundtrips which it set up in advance to handle expected overflow passengers. (J.A. 34-36).

It is the practice in the airline industry to schedule extra section flights well in advance of the time they are actually operated based on an estimate of need derived from experience as to the times of day, the days of the week, and the route segments over which the traffic is likely to exceed the capacity of the regular flights. It is not the practice to set up an extra section flight at the last minute to meet a need that occurs on the spot, since it is simply not possible to manipulate aircraft around a carrier's system with that degree of speed, nor is it economical for an airline to maintain numbers of aircraft which it does not regularly use, simply in order to keep them available for unforseen traffic peaks. For these reasons, extra sections must be carefully planned well in advance of the time they actually will be operated in order to insure the availability of the equipment and the integration of these flights with the overall operations of the carrier. (J.A. 33-37, 74-79).

Thus, in planning its roundtrip, extra section flights in advance, Mohawk's practice was to schedule them only if its overall receipts from the whole roundtrip were expected to be sufficient to make the entire roundtrip contribute not only to reducing its need for subsidy but also the actual subsidy it would otherwise receive. (J.A. 34). Under these circumstances, it was inevitable that on certain occasions return portions of roundtrips would be op-

erated without any passengers abroad. It is these trips that Respondent seeks to disallow, years after the event, in computing Petitioner's subsidy mail pay needs for the period October 1, 1953 through June 30, 1955, in spite of the fact that Petitioner had informed Respondent of its practice *during* the period in question. If Respondent had objected to the practice at that time, Petitioner or Respondent could have reopened Petitioner's mail rate in order to establish a rate, the level of which would have been based on whatever new definition of extra section mileage Respondent intended to impose.

Under date of May 27, 1954, Petitioner responded to Instruction Letter No. 1 under Reorganization Plan No. 10—and gave a detailed description of the procedures followed in authorizing extra sections. In that letter, Petitioner stated:

> "A regular procedure is followed in authorizing extra sections of regular flights as follows: The Sales Department maintains a log sheet for each month by day. First they list the 'Posted Flights' under the proper day as that information comes in to them from the station. A 'Posted Flight' is one that has 22 seats sold. Then, upon review of the 'Posted Flights' and additional information received from stations in regards to additional requests for space on these flights, the Sales Department makes requests to the Operations Department for extra sections and the extra sections requested are listed on the log sheet. Finally, as the requests for extra sections are confirmed by the Operations Department, the confirmed extra sections are listed on the log sheet, and, in most cases, the confirmed extra sections are flown unless cancelled for mechanical reasons, weather, etc."

> "The request for extra sections by the Sales Department is based upon a very careful evaluation of estimated revenue, and comparing that revenue with

> the cost of operating the flight. The cost of operating the flight is based on the application of a pre-determined cost per mile to the total roundtrip miles to be flown and, in the same manner, the revenue yield is estimated on the roundtrip. The result of this careful analysis of expense and revenue is that extra sections are not flown unless the estimated round trip revenue potential exceeds the estimated round-trip cost of operation." (J.A. 34).

Petitioner was never told by Respondent that its practice as reported to Respondent was possibly incorrect until it received a letter from Respondent dated November 7, 1955 (J.A. 31), and no adjustment to its final mail rate was proposed until it received a letter from Respondent dated October 25, 1957. (J.A. 40).

Under these circumstances, Petitioner contends that Respondent has made an illegal retroactive adjustment to its final mail rate based on an after-the-fact definition of the term extra section mileage and further has acted arbitrarily, capriciously, and in abuse of its discretion. Petitioner therefore seeks review in this Court of Respondent's action making the aforesaid off-set.

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 737 *et seq.*, 49 U.S.C. §§ 1301 *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237 *et seq.*, 5 U.S.C. §§ 1001 *et seq.*, are set forth in the Appendix hereto.[1]

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[1] The Air Carrier Economic Regulation Section—Title IV of the Civil Aeronautics Act of 1938, 52 Stat. 977, was recodified in the Federal Aviation Act of 1958, 72 Stat. 754 *et seq.*, and most sections were renumbered althought not changed substantially. Although the Civil Aeronautics Act was in effect during the period in question—Oct. 1, 1953, to June 30, 1955, for convenience of reference, except as specifically noted, all references are to the Federal Aviation Act.

STATEMENT OF POINTS

1. Respondent's action set forth in its letter of May 15, 1963, constituted a prohibited retroactive adjustment to Petitioner's final subsidy mail rate which was illegal under Section 406 of the Federal Aviation Act of 1958. That Act has been interpreted repeatedly to mean that in its rate setting, Respondent may not make retroactive adjustments in final mail rates either in favor of itself or in favor of the carrier whose mail rate is being adjusted.

2. Respondent's action set forth in its letter of May 15, 1963, constitutes arbitrary and capricious action that should be set aside as an abuse of discretion pursuant to Section 10(e) of the Administrative Procedure Act.

3. Respondent's action set forth in its letter of May 15, 1963, constitutes action reviewable by this Court under Section 1006 of the Federal Aviation Act of 1958 and Section 10 of the Administrative Procedure Act.

SUMMARY OF ARGUMENT

I

Respondent may not adjust final mail rates retroactively. This principle is undisputed. *TWA* v. *CAB*, 336 U.S. 601 (1949). The question in this case is whether Respondent's action constituted such a prohibited retroactive adjustment of Petitioner's final subsidy mail rate for the period from October 1, 1953, through June 30, 1955.

The amount of subsidy mail pay to which Petitioner was entitled for the above period under the subsidy formula then in effect was dependent partially upon the amount of "extra section" mileage operated by it. The term "extra section" mileage was not defined by the order setting Petitioner's mail rate. The manner in which Petitioner reported such mileage to Respondent during the

above period was in accord with its previous consistent practice of reporting such mileage and with the practice of others in the industry. (J.A. 74-79). Further, Petitioner's manner of reporting was not inconsistent with any definitions of the term "extra section" mileage existing in any of Respondent's regulations, instructions, or standard practice letters. Petitioner's practice of reporting as extra section miles the roundtrips scheduled by it to meet expected peak demands was entirely reasonable in the absence of any contrary definition of the term "extra section" mileage.[1]

After the period had expired during which the subject rate was in effect, Respondent issued an entirely new definition of "extra section" mileage contrary to the one followed by Petitioner. (JA. 40). Respondent proposed to apply this definition retroactively to the period here in question. Respondent subsequently *twice* revised this definition demonstrating that Respondent was developing a *new*, retroactive definition to apply to Petitioner's mail rate and that at the time the mail rate involved in this appeal was in effect there was no definition of "extra section" in existence which was contrary to the one followed by Petitioner. (J.A. 46, 81). Under each of these definitions, some of the extra section mileage previously reported by Petitioner would have been disallowed for rate purposes. Pursuant to its last definition, Respondent offset the sum of $18,204.16 from subsidy mail pay otherwise due Petitioner.

Petitioner submits that a final mail rate may be revised retroactively just as effectively by giving new definitions to terms relevant to the amount paid under that rate as by an adjustment in the level of the rate itself. Thus, Respondent's action in defining and redefining the term "extra section" mileage *after* the period in question,

[1] Not all of Petitioner's extra section flights were scheduled as roundtrips.

and then in applying that definition *retroactively* to recapture sums already paid constituted a prohibited retroactive adjustment to Petitioner's final mail rate.

II

Aside from the illegality of Respondent's action for the reasons set forth above, under the circumstances of this case, such action was arbitrary, capricious and an abuse of discretion which should be set aside by this Court pursuant to Section 10(e) of the Administrative Procedue Act. 60 Stat. 243, 5 U.S.C. § 1009(e).

Respondent has stated that what constituted "extra section" miles was a problem of long standing which existed even before October 1, 1953. (J.A. 40). In spite of this fact, Respondent did not define the term in its Order E-8181, dated March 24, 1954, which set Petitioner's mail rate for the period here in question. That Respondent's retroactive definition was not the obviously correct way of reporting such mileage is further shown by Respondent's admission that virtually all of the carriers were reporting extra section mileage in a manner different from the definition it proposed. (J.A. 40-41).

Petitioner submits that when it planned these extra section flights—sometimes weeks in advance of the time that they were actually operated—it was in substantially a different position and had a substantially different viewpoint than Respondent had when it adjusted Petitioner's mail pay years after the flights were actually operated.

In view of the fact that the operation by Petitioner of these extra section flights contributed to reducing its subsidy, and the fact that Petitioner had informed Respondent *during* the period in question of its extra section reporting practices, Petitioner submits that Respondent was without any standing to many years later disallow the return portion of certain extra section roundtrips on which

no passengers were carried and that to do so was arbitrary, capricious, and an abuse of discretion. This Court, therefore, should set aside Respondent's action.

III

Contrary to Respondent's contention in its motion to dismiss, this Court has jurisdiction of the subject matter of the petition for review. This Court has denied Respondent's contention and should re-affirm that action. Respondent's contention lacks merit for the following reasons:

First, Respondent's action is a final agency determination of Petitioner's right to $18,204.16 and is therefore reviewable by this Court. No other conclusion is possible in view of Respondent's language in its letter of May 15, 1963, that: "The matter was referred to the Board and upon full consideration, the Board has affirmed the position expressed in Mr. Russell's letter." After stating its position, Respondent concluded: "In view of the foregoing, *the Board has determined* to disallow those claimed extra section miles on which no passengers were carried in the computation of Mohawk's subsidy as outlined in Mr. Russell's letter of January 14, 1963." (J.A. 92, 95). (Emphasis supplied). The form in which Respondent's action is set forth is irrelevant to this Court's jurisdiction.

Secondly, the petition for review presents only legal issues which this Court has full power to decide. Respondent's action subject to review in this Court is not limited to that taken with all the trappings of a formal hearing. The "letter" from Respondent is an order which sets forth the findings upon which it is based and it has an effect on Petitioner of the most direct sort since money has been recaptured from Petitioner on the basis of it.

Finally, Respondent's allegation in its motion to dismiss that Petitioner has an adequate remedy in the Court of

Claims is unsound, and, in any case, such a remedy does not prevent Petitioner from following the statutory method of review. It is now well established that the Court of Claims lacks jurisdiction to review orders of administrative agencies when other forms of review have been provided by statute. Even if the Court of Claims had jurisdiction of this action, which is, at best, extremely doubtful, this fact would not prevent Petitioner from following its statutory method of review since Respondent has not shown that this statutory review proceeding would be inadequate in this case as required by Section 10(b) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009(b).

ARGUMENT

I. Respondent Illegally Adjusted Retroactively Petitioner's Final Mail Rate Pursuant To A Retroactive Definition Of The Term "Extra Section" Mileage Contained In The Order Setting That Mail Rate.

The petition for review herein presents for decision the question of whether Respondent's retroactive definition of the term "extra section" mileage contained in Order E-8181, pursuant to which Respondent reduced the amount of subsidy already paid to Petitioner under the final mail rate set by that order, constitutes a prohibited retroactive adjustment of a final mail rate. Order E-8181 dated March 24, 1954, set Petitioner's final subsidy mail rate for the period October 1, 1953—June 30, 1955, involved in Respondent's adjustment.

Respondent may not adjust final mail pay rates retroactively. This well established principle is applicable whether the rate being adjusted is a subsidy rate or a service rate since the same underlying considerations are present—*i.e.*, that Section 406 of the Federal Aviation Act does not contemplate a cost-plus system of ratemaking. Further, of course, it is irrelevant whether the ad-

justment being made is in favor of the government or the carrier. *TWA* v. *CAB*, 336 U.S. 601 (1949); *Delta Air Lines* v. *CAB*, 108 U.S.App.D.C. 88, 280 F.2d 636 (1960), *cert. denied*, 364 U.S. 870; *Summerfield* v. *CAB*, 92 U.S.App.D.C. 248, 207 F.2d 200 (1953), *aff'd sub nom., Western Air Lines* v. *CAB*, 347 U.S. 67 (1954); *Summerfield* v. *CAB*, 92 U.S.App.D.C. 256, 207 F.2d 207 (1953), *aff'd sub nom., Delta Air Lines* v. *Summerfield*, 347 U.S. 74 (1954); *Capital Airlines* v. *CAB*, 84 U.S.App.D.C. 176, 171 F.2d 339 (1948), *cert. denied*, 336 U.S. 961 (1949).

It is Petitioner's contention that a mail rate may be revised retroactively by redefining terms relevant to the amount paid under that rate just as effectively as by an adjustment in the level of the rate itself and that it is just as illegal to adjust a final mail rate retroactively in this manner as it would be to change the level of the rate retroactively. Respondent apparently agrees with this contention in principle for it stated in its letter of May 15, 1963:

> "Since that rate order is a final order for all purposes, we cannot undertake a partial reopening in the guise of an interpretation." (J.A. 95).

In any event it seems clear that Respondent cannot do indirectly, by interpretation—that which it is prohibited from doing directly by adjustment See *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 310 (4th Cir. 1943), *reversed on other grounds*, 320 U.S. 591 (1944).

As will be demonstrated below, during the period involved, there was no definition of extra section mileage in effect contrary to the one followed by Petitioner. Further, the practice followed by Petitioner in reporting extra section mileage was reasonable in view of the practical considerations involved in scheduling extra section flights, in view of industry practice at the time, and in view of other relevant circumstances then existing.

First, the guidelines which Petitioner had to follow at the time it acted should be considered. Order E-8181 provided that the scheduled miles flown should include "all trips operated as extra sections thereto", but did not define the term further.

Under this Order, Petitioner reported all mileage performed in roundtrip, extra section flights as extra section mileage during the period October 1, 1953, to June 30, 1955, in accord with its previous consistent practice of reporting such mileage. (J.A. 33-37). Other carriers similarly situated did likewise. (J.A. 74-79).

In fact, when Respondent first set forth a definition of extra section miles contrary to the one followed by Petitioner in the letter dated October 25, 1957, it stated that:

> ". . . in virtually all cases, extra-section miles have been claimed by carriers for subsidy mail pay purposes which do not meet the foregoing test, hereinafter referred to as the 'combined load-factor test.'" (J.A. 40-41).

The fact that Respondent subsequently twice revised this definition conclusively proves that Respondent was developing a new definition to apply retroactively to Petitioner's mail rate and that at the time the mail rate involved in this appeal was in effect there was no definition of "extra section" in existence which was contrary to the one followed by Petitioner.

Petitioner's manner of reporting also was not inconsistent with any definitions of the term "extra section" mileage existing at the time in any of Respondent's regulations, instructions, or standard practice letters.[1]

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[1] Respondent's Uniform System of Accounts for Air Carriers stated:

"*Scheduled service* means all revenue flights operated over the air carrier's certificated routes pursuant to published flight schedules and all flights operated as extra sections thereto, and all non-

(cont. next page)

As indicated by the excerpts set forth, the Uniform System of Accounts, far from supporting Respondent's new definition of extra section mileage, recognized that extra section flights might be designated for a particular traffic purpose and not actually carry that traffic. The other references to extra section flights in the Uniform System of Accounts do not shed any light on defining them.

In Instruction Letter No. 1 under Reorganization Plan No. 10, dated October 13, 1953, Respondent requested, *inter alia*, "a detailed description of procedures used for authorizing extra sections of regular flights." (J.A. 105). Petitioner subsequently responded to this request (J.A. 34), but no question was raised concerning its extra section practices until after the period involved had expired, in spite of Respondent's alleged concern with the problem even before Petitioner's rate was set. (J.A. 40).[1]

In its Standard Practices Letter No. 15 dated June 15, 1955, and of necessity therefore not received in time to affect Petitioner's practices during the period in question, even if Petitioner had seen reason to do so after receiving that letter, Respondent had this to say about extra sections:

(Cont. from p. 13)

revenue flights incident to the revenue flights so defined." (J.A. 96).

"*Line 2, Passenger, Property and United States mail—extra sections,* shall be used for reporting the aircraft miles flown on extra sections of schedule flights *which are designated to carry United States mail, whether or not mail is carried on such flights.*

* * * *

"*Line 4, Property and United States mail only—extra sections,* shall be used for reporting the aircraft miles flown on extra sections of scheduled cargo flights *which are designated to carry United States mail, whether or not mail is carried on such flights.*" (Emphasis supplied). (J.A. 97).

[1] "The extra section miles problem is one of long standing which *predates* the transfer of the subsidy payment function to the Board, effective October 1, 1953." (Emphasis supplied).

> "*Extra section flight.* Extra section flights are those operated to accomodate overflow traffic from regularly scheduled flights and should be reported as revenue miles in scheduled service. Flights made in ferrying aircraft to meet schedules, or for similar operational reasons, are not extra sections and should be reported as non-revenue flights even if an occasional shipment of revenue traffic is on board as a matter of special accomodation." (J.A. 108).

Until receipt of the above letter, no audit group sent out by Respondent had ever indicated to Petitioner that its reporting of extra section flights might be erroneous. (J.A. 35).

In light of the above circumstances, and in view of the practical considerations involved in scheduling extra section flights, Petitioner's practice of reporting as extra section miles the roundtrips scheduled by it to meet expected peak demands was entirely reasonable in the absence of any contrary definition of the term "extra section" mileage. The reasons for Petitioner's usual practice of scheduling extra sections as roundtrips have been set forth previously at pp. 4-6, *supra*.

The purpose for which Petitioner's extra sections were operated also establishes the reasonableness of Petitioner's reporting practice. Under Petitioner's practice of scheduling extra section flights, the return portion *could* be sold (and frequently was) and therefore the *purpose* of the flight was to obtain revenue. As Petitioner stated below:

> "In addition to the fact that *round trip* extra sections *are not set up* unless it appears that our break-even need would be decreased as a result, it should be pointed out that the procedure calls for every possible attempt to be made to pick up as much revenue as possible on the return portion of the trip by advising all scheduled stops of the flight. Consequently, the *express* purpose of the entire round trip flight is to carry revenue and not to ferry aircraft to meet

schedules or for similar operational reasons." (J.A. 36).

Respondent recognizes that the purpose of a flight is important to its classification. Thus, it stated below:

> "The position taken by the Board soon after adoption of the sliding scale, passenger load factor formula was that the term "extra section" referred basically to a flight which is operated, *for traffic purposes only*, as part of the carrier's schedules in order to accommodate traffic which cannot be handled on the regular flights." (J.A. 40). (Emphasis supplied).

Respondent reaffirmed this position in its final order:

> "The Board has always considered that for a flight to be an extra section it must have been operated in relation to a scheduled flight, and *it must be operated for a revenue producing purpose* as distinguished from an operational purpose." (J.A. 92-93). (Emphasis supplied).

The only reasonable conclusion that can be drawn from the above facts is that Petitioner acted reasonably in reporting its extra section flights and not in contravention of any definition of such flights in effect at the time it acted.

Respondent recognizes that the end result of its action is to recapture subsidy paid during a past period, but attempts to justify this action by making an analogy to the correction of a clerical error. Thus, Respondent stated:

> "Although the end result might be a recapture of subsidy paid during a past period, this is not a violation of the finality of the rate, any more than it could be asserted that field audit adjustments to correct clerical discrepancies of reported revenue passenger-miles, also resulting in a recapture, in any way violate the finality of a rate." (J.A. 49).

Respondent commits a fundamental error in comparing its adjustment of Petitioner's final mail rate to the correction of a clerical error. Clerical errors, by their very nature, could not have been an element in the establishment of a rate initially. If a carrier, for example, commits a clerical error in recording its mileage, it is clear that a subsequent adjustment of the amount of subsidy paid to the carrier, because of correction of this error, does not constitute an adjustment of the rate since no rate is set so as to contemplate the payment of subsidy on account of clerical errors. In this case, however, Petitioner's method of reporting extra section mileage was a material element in the setting of the level of its mail rate for the period from October 1, 1953, through June 30, 1955, *infra*, pp. 18-19.

In the final analysis, the basic matter involved at the time Petitioner's mail rate was set by Order E-8181 was Petitioner's "need" for mail pay. *Summerfield* v. *CAB*, 92 U.S.App.D.C. 256, 207 F.2d 207 (1953), *aff'd sub nom.*, *Delta Air Lines* v. *Summerfield*, 347 U.S. 74 (1954). Therefore, if only one of the elements upon which that rate was set is now changed, a rate will have been established which is not geared to meet the need of Petitioner for mail pay found to exist in Order E-8181.

Petitioner does not contend that Respondent's definition of "extra section mileage" could not have been applied *prospectively* at any time. While Petitioner does not agree with this new definition, it is probably within a permissible range of reasonableness in which Respondent can exercise its discretion. Petitioner does quarrel with the *retroactive* application of this definition to a mail rate set on another basis.

For the above reasons, Petitioner submits that the action of Respondent set forth in the letter of May 15, 1963, constitutes a prohibited retroactive adjustment of Petitioner's final subsidy mail rate.

II. Respondent's Retroactive Application Of Its Latest Definition Of Extra Section Mileage To Petitioner's October 1, 1953-June 30, 1955 Operations Is Arbitrary And Capricious Action That Should Be Set Aside As An Abuse Of Discretion.

In the circumstances of this case Respondent's retroactive application of its after-the-fact definition of extra section mileage to services performed by Petitioner between October 1, 1953, and June 30, 1955, is arbitrary and capricious action constituting an abuse of discretion which this Court should set aside pursuant to Section 10 (e) of the Administrative Procedure Act. 60 Stat. 243, 5 U.S.C. § 1009(e).

To allow a retroactive effect to be given to Respondent's after-the-fact definition would be particularly inequitable in this case. In order to fully understand the arbitrary and capricious nature of Respondent's action it is necessary to set forth below in some detail the manner in which the mail rate for the period in question was set.

The extra section miles reported by Petitioner for the 12 months ending July 31, 1953, were used as the basis from which to forecast extra section miles in the future in the course of setting the mail rate established by Order E-8181. These extra section miles included extra section roundtrips in accordance with Petitioner's consistent practice in reporting such mileage. (J.A. 35). If Respondent's definition of extra sections had been known by the parties at the time the mail rate was computed, Petitioner would not have included those portions of its extra sections having a zero load factor in the forecast base. This would have resulted in a higher forecast load factor [1] being built into the mail rate. Under the mail rate formula then in effect, Petitioner's subsidy was reduced as its

[1] "Load factor" is simply the percentage of the total seats on a plane occupied during a flight.

actual load factor exceeded its forecast load factor.[1] Therefore, it would be extremely inequitable to allow Respondent to retroactively raise the actual load factor for this period (the effect of disallowing the zero load factor extra section flights) while keeping the forecast load factor at the lower level caused by the inclusion of such flights in the computation of that figure.

Operation by Petitioner of its extra sections also contributed to reducing its subsidy. Under the formula prescribed by Order E-8181, the more scheduled miles flown by a carrier in extra section service, the lower its subsidy would be, provided that it at least maintained its overall load factor built into the formula. During the period in question, Petitioner experienced a higher load factor than forecast. Thus, the subsidy received by Petitioner was less than forecast. Because Petitioner's overall extra section load factor was also higher than the base or forecast load factor, Petitioner's extra section operations contributed to the lowering of its subsidy. (J.A. 88).

Respondent now seeks to skim the cream off Petitioner's extra section operation by taking the benefit of the high load factor portion of the round trip and disallowing the rest. As Petitioner stated:

> "Since the extra section is established on the basis of the round trip breaking even (without benefit of subsidy) and our subsidy formula being what it is, if one direction is considered a ferry, then the government would receive a substantial part of the income for the loaded flight while the airline would stand the cost of returning the ship without benefit of revenue on the return. Thus, what was figured to be a

[1] "The base rate has been established at 69.79 cents, which rate will reduce proportionately as the mileage operated exceeds an average of 5500 miles per day and will be further reduced by 0.90 cents per mile for each one percent increase in passenger load factor above 42 percent." (J.A. 19-20).

> flight that would pay its way might result in a net loss to the airline." (J.A. 35).

In these circumstances Respondent should not be permitted to give *retroactive* effect to its *latest* definition of extra section mileage. An examination of the applicable law demonstrates that Respondent's attempt to do so constitutes arbitrary and capricious action and is an abuse of its discretion.

Generally, public policy requires that laws should not be retroactively applied. See *Leedom* v. *International Brotherhood Elec. Workers, Local No. 108*, 107 U.S.App. D.C. 357, 360, 278 F.2d 237, 240 (1960). This public policy against retroactive lawmaking applies to acts of administrative agencies for in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 389 (1932), the Supreme Court held that an administrative agency may not give retroactive effect to its legislative acts.[1]

Moreover, in the Administrative Procedure Act Congress has expressed a policy disapproving of retroactive agency action. In *NLRB* v. *Guy F. Atkinson Co.*, 195 F. 2d 141 (9th Cir. 1952) the Court examined the Administrative Procedure Act and concluded that in Section 3:

> " 'Congress expressed a mood' . . . . The mood was one of disapproval of the application of agency policies to persons who acted without an opportunity to know that such policy would be applied to their con-

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[1] See also *Lesavoy Foundation* v. *Commissioner of Internal Revenue*, 238 F.2d 589, 591 (3rd Cir. 1956) where the court said:

> "We quite realize that the Commissioner may change his mind. . . . But it is quite a different matter to say that having once changed his mind the Commissioner may arbitrarily and without limit have the effect of that change go back over previous years during which the taxpayer operated under the previous ruling."

duct. *The mood was one of disapproval of retroactive agency action.*" 195 F.2d at p. 150. (Emphasis supplied).

Respondent's after-the-fact definition of extra section mileage was not based upon the judicial process of reasoned elaboration from precedent. Rather it was a legislative declaration. Accordingly, this definition should not be given retroactive effect.

Of course, not all retroactive agency action is prohibited, but that of Respondent in this case falls outside the permissible discretionary area for such action. In *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947)[1] in affirming certain retroactive agency action the Supreme Court said:

> "That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 620 . . . ." 332 U.S. at p. 203.[2]

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[1] Unlike the *Chenery* case in which the SEC adopted a stricter rule regarding the fiduciary responsibility of management during a reorganization in approving a reorganization plan, the agency action here contested is the imposition of a definition of extra section mileage years after Respondent's approval of the mail rate and payment under it.

[2] The basic reason for varying from the normal restriction against retroactive action as set forth by the Supreme Court in *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 622 (1944), is to do better justice in the particular case.

It would be a peculiarly inappropriate result if these cases, clearly standing for the proposition that the Court may vary

(cont. next page)

The nature of situations that the Supreme Court considered appropriate for solution by retroactive agency action are indicated by the following examples which it gave in the *Chenery* case:

> ". . . problems may arise in a case which the administrative agency could not reasonably foresee. . . . Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective." 332 U.S. at pp. 202-203.

None of those situations are involved in the circumstances of this case. Respondent, by its own admission, was aware of the problem prior to the time it set Petitioner's mail rate. (J.A. 40). It is also clear that this is not a problem that must be dealt with on "a case-to-case basis" since what is properly extra section mileage need not vary from carrier to carrier. If Respondent was not prepared to issue a rule, it could have followed a course of action which would not have harmed Petitioner by retroactive application by defining the term in Order E-8181.

As another alternative, Respondent could have required Petitioner to submit information relative to its interpretation of extra section mileage pursuant to Respondent's power under Section 407 of the Federal Aviation Act, 72 Stat. 766, 49 U.S.C. § 1377, "to require from any air carrier specific answers to all questions upon which the

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(Note 2 cont. from p. 21)

hardened common law rules in order to bring about a just result in the case, should be held to be authority for abrogating the common law protection against retroactive government action to promote an inequitable and grossly unfair result.

Board may deem information to be necessary", prior to the time Petitioner's rate was set. Respondent also could have put its definition of extra section mileage into effect prospectively at any time.

If Respondent had followed any of the above alternative courses of action, Petitioner would have been put on notice and could have changed its extra section practices or sought a different rate.

The multiplicity of alternatives to retroactive action open to Respondent is significant for in *Leedom* v. *International Brotherhood Elec. Workers, Local No. 108, supra*, 107 U.S.App.D.C. at p. 363, 278 F.2d at p. 243, this Court considered the most important factor in appraising retroactive agency action to be whether the agency had readily available alternatives.

Respondent also cannot justify giving its latest definition retroactive effect on the grounds that the public interest demands it. See *NLRB* v. *E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961). Indeed, in light of the judicial decisions holding that retroactive adjustments in mail pay are illegal, it appears that the public interest demands that Respondent's latest definition should *not* be given retroactive effect. Nor can Respondent contend that its definition must be given retroactive effect in order to fulfill a statutory design or to comply with any legal or equitable principles. To the contrary in this case, retroactive application of Respondent's latest definition would be inequitable. *Supra*, this Brief, pp. 18-20; *NLRB* v. *Guy F. Atkinson Co., supra.*

In setting aside the NLRB's order in the *Atkinson* case under Section 10 of the Administrative Procedure Act as arbitrary, capricious and an abuse of discretion, the Court considered it important that there had been no conscious action contrary to any policy or regulation, 195

F. 2d at p. 149.[1] In this case, Petitioner is likewise innocent of any conscious action contrary to any policy or regulation. When Petitioner acted, it was unable to know that the reasonable definition of extra section miles upon which it relied would be changed with retroactive effect.

Therefore, in light of the fact that: (1) there is a strong public policy against retroactive lawmaking especially applicable to retroactive agency action; (2) Petitioner's action was based upon a reasonable definition of the term extra section mileage and was not contrary to any established rule or policy; (3) there is no overriding public interest in the retroactive application of Respondent's latest definition of "extra section" mileage to Petitioner's October 1, 1953-June 30, 1955 services, in fact, the public interest as expressed in judicial decisions is that Respondent's latest definition should *not* be given retroactive effect; (4) Respondent could have defined extra section mileage in a manner which would have avoided retroactive appli-

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[1] The NLRB's changes in its self-imposed limits upon jurisdiction have led to considerable litigation. *E.g., NLRB* v. *Pease Oil Co.*, 279 F.2d 135 (2nd Cir. 1960); *NLRB* v. *Guernsey-Muskingum Electric Co-operative*, 285 F.2d 8 (6th Cir. 1960); *NLRB* v. *W. B. Jones Lumber Co.*, 245 F.2d 388 (9th Cir. 1957). Generally, these cases permit the Board to change its self-imposed limits upon jurisdiction. But see *Pedersen* v. *NLRB*, 234 F.2d 417 (2nd Cir. 1956). In spite of these decisions *Guy F. Atkinson* has not been overruled. See *NLRB* v. *Olaa Sugar Co.*, 242 F.2d 714, 721 (9th Cir. 1957) and *NLRB* v. *Herald Publishing Company of Bellflower*, 239 F.2d 410, 412 (9th Cir. 1956).

The results in those cases permitting the NLRB to change its jurisdictional guidelines may be explained by the fact that in those cases the employer had acted in clear violation of an established rule. *NLRB* v. *Pease Oil Co., supra.* Hence the employer was not innocent of a conscious violation. See generally 66 Harv. L. Rev. 348 (1952).

All of these cases present a stronger case for retroactive application than the present because the NLRB must choose between harming the employer by retroactive application or harming the injured employee by refusing to vindicate his right clearly within its statutory jurisdiction.

cation; and (5) such retroactive application would produce an inequitable result and cause harm to Petitioner, Respondent's action in the May 15, 1963, letter is arbitrary and capricious and an abuse of discretion that should be set aside by this Court pursuant to Section 10 (e) of the Administrative Procedure Act.

III. This Court Has Jurisdiction Of The Petition For Review.

Respondent filed a motion to dismiss the petition for review herein on September 6, 1963, on the ground that this Court lacked jurisdiction of the subject matter. Petitioner answered in opposition to this motion to dismiss on September 25, 1963. This Court denied Respondent's motion to dismiss on October 10, 1963, without prejudice to Respondent's right to renew it in its brief on the merits. It is anticipated that Respondent will renew this motion to dismiss in its brief on the merits and it is therefore requested that the Court again deny such relief to Respondent since it clearly appears, as more fully set forth in Respondent's answer to the motion to dismiss, that this Court does have jurisdiction of this action.

First, the May 15 letter is a final agency determination of Petitioner's rights and is therefore reviewable by this Court. The off-set has, in fact, been made from the subsidy payment made to Petitioner on May 28, 1963. It is clear that the Board intended the May 15 letter to be a final determination of Petitioner's rights. The letter states that the matter was referred to the Board, and upon "*full consideration*" the Board has "*affirmed*" the position of its staff and "*has determined*" to make the offset. (J.A. 92, 95). (Emphasis supplied).

The principle governing reviewability is that agency action to "impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process" is reviewable. *Chicago & Southern Air*

Lines v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); *Isbrandtsen Co.* v. *United States*, 93 U.S.App. D.C. 293, 297, 211 F.2d 51, 55 (1954), *cert. denied*, 347 U.S. 990.

This principle is clearly applicable to rate orders which foreclose a right of a party to a sum of money. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202 (1960).

Secondly, the petition for review presents only legal issues which this Court has full power to decide. Basically, the questions presented are simply the legal ones of whether the Board's action constitutes a prohibited retroactive adjustment of a final mail rate, and whether, under the circumstances of this case, the Board's action is arbitrary, capricious, and an abuse of discretion.

Respondent has contended that only its action taken with all the trappings of a formal hearing is reviewable in this court under Section 1006 of the Federal Aviation Act. Such a contention is erroneous on its face and unsupported in the law. As stated in *Cities Service Gas Co.* v. *FPC*, 255 F.2d 860, 863 (10th Cir. 1958), *cert. denied*, 358 U.S. 837, to adopt Respondent's contention would mean that the procedure for review could be successfully circumvented simply by refusal of the agency to act upon a statutorily granted right or to hold a hearing. As this Court stated in *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 69 App.D.C. 166, 172, 99 F. 2d 399, 405, (1938),

> "While it is proper to look to such indicia as notice, hearing, and findings, for guidance in determining whether an order is reviewable, they are not alone controlling."

It is well established that the mere fact that an administrative agency enters an order without a hearing does not insulate that order from judicial review. *American Sumatra Tobacco Corp.* v. *SEC*, 68 App.D.C. 77, 81-82, 93 F.2d 236, 240-241 (1937).

It is clear that this Court has jurisdiction of the petition for review herein in the light of the principles discussed. The "letter" from Respondent is an order which sets forth the findings upon which it is based and it has an effect on Petitioner of the most direct sort since money has been recaptured from Petitioner on the basis of it.

Respondent has alleged that certain factual disputes exist between it and Petitioner which prevent this Court from taking jurisdiction of the petition for review. Certainly, Respondent cannot now contend that if the factual issues which it raised in its motion to dismiss had been resolved in favor of petitioner, it would have decided differently on the matter at issue, or else it would have been required to hold a hearing to resolve these issues. Therefore, this Court must treat the matter as if these alleged factual disputes had been resolved in favor of Petitioner since it seems clear that Respondent believed that, even if they had been, it would have taken the action that it did. *Baltimore & Ohio R.R.* v. *United States*, 264 U.S. 258, 262-263 (1924); *Pollak* v. *Public Utilities Commission*, 89 U.S.App.D.C. 94, 98, 191 F.2d 450, 454 (1951), *reversed on other grounds*, 343 U.S. 451 (1952); *Philadelphia Co.* v. *SEC*, 82 U.S.App.D.C. 335, 336, 164 F.2d 889, 890 (1947); *Aluminum Company of America* v. *FPC*, 76 U.S.App.D.C. 182, 130 F.2d 445 (1942).

If this Court should determine that there are any factual issues which need to be resolved in connection with determining whether Respondent acted illegally in defining extra section mileage with a retroactive effect, it has power to remand the case to Respondent to hold a hearing and resolve those limited issues. *United Air Lines* v. *CAB*, 108 U.S.App.D.C. 220, 281 F.2d 53 (1960). The mere potentiality that such issues may arise on review does not affect the jurisdiction of this Court over the petition to review.

Finally, Respondent's allegation in its motion to dismiss that Petitioner has an adequate remedy in the Court of Claims is unsound and unsupported in the law, and, in any case, such a remedy does not prevent Petitioner from following the statutory method of review.

It is now well established that the Court of Claims lacks jurisdiction to review orders of administrative agencies when other forms of review have been provided by statute. *United States* v. *Jones*, 336 U.S. 641 (1949); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202 (1960); *Davidson Transfer & Storage Co.* v. *United States*, 164 F.Supp. 571, 574 (D.Md. 1958).

In the *Pennsylvania R.R.* case, *supra*, the carrier sought review in the statutory manner in a District Court of an order of the ICC dealing with whether the domestic or export rates of the carrier applied to certain shipments. The Supreme Court ruled against a contention of the United States that the carrier's proper remedy was in the Court of Claims stating:

> "We have already determined, however, that the power to review such an order cannot be exercised by the Court of Claims. *United States* v. *Jones*, 336 U.S. 641, 651-653, 670, 671 . . . . That jurisdiction is vested exclusively in the District Courts. 28 USC § 1336, 49 USC § 17(9). See *Seaboard Air Line R. Co.* v. *Daniel*, 333 U.S. 118, 122 . . . ."

It thus seems clear that the Court of Claims may not review orders of the CAB such as the one of which review is sought herein. See also that Court's dismissal of the petitions in *Capital Airlines* v. *United States*, 90 F.Supp. 926 (Ct. Cl. 1950), *cert. denied*, 340 U.S. 875; *Capital Airlines* v. *United States*, 113 F.Supp. 641 (Ct. Cl. 1953).

Assuming that the Court of Claims had jurisdiction of this action, this fact would not prevent Petitioner from following its statutory method of review. Section 10(b)

of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009(b), provides in part as follows:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action * * * in any court of competent jurisdiction."

Respondent has not shown that the statutory review proceeding would be inadequate in this case, as required by the above statute, and therefore Petitioner should not be required to resort to the Court of Claims. On the contrary, the doubtful jurisdiction of that court is an added reason for this Court to retain jurisdiction of this action.

CONCLUSION

For the reasons set forth in this Brief, Petitioner asks this Court to reverse and set aside the action of Respondent set forth in its letter dated May 15, 1963, and to remand the case to Respondent for such further proceedings as this Court may deem necessary.

Respectfully submitted.

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APPENDIX

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 737 *et seq.*, 49 U.S.C. §§ 1301 *et seq.*, are as follows:

Rates for Transportation of Mail

Authority to Fix Rates

Sec. 406. [*72 Stat. 763, as amended by 76 Stat. 145, 49 U.S.C. 1376*] (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same.

Rate Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration,

among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Payment

(c) The Postmaster General shall make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section without regard to clause (3) of subsection (b) of this section. The Board shall make payments of the remainder of the total compensation payable under this section out of appropriations made to the Board for that purpose.[1]

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

SEC. 1006. [*72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486*] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of

[1] Subsections (d) through (h) of Section 406 have been omitted as not pertinent to the issues in this appeal.

any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; Filing of Transcript

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

Power of Court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such manadatory or other relief as may be appropriate.

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 273 *et seq.*, 5 U.S.C. 1001 *et seq.* are as follows:

JUDICIAL REVIEW

SEC. 10. [*60 Stat. 243; 5 U.S.C. 1009*] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judg-

ments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any

agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,986

MOHAWK AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITION FOR REVIEW OF AN "ORDER"
OF THE CIVIL AERONAUTICS BOARD

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QUESTIONS PRESENTED

In respondent's view, the questions for decision are as stated in petitioner's brief.

INDEX

Index Continued

AUTHORITIES CITED

Cases:

Index Continued

Index Continued

Index Continued

*Cases chiefly relied upon are marked by asterisks.

Index Continued

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

The "order" which petitioner seeks to have reviewed by this Court is a letter (J.A. 91-95) dated May 15, 1963, from the Chairman of the Civil Aeronautics Board to an officer of petitioner, expressing the Board's position that petitioner had received excess subsidy mail pay in the amount of $18,204.16 for the period October 1953-June 1955, and notifying petitioner that this sum would be withheld from the next monthly subsidy mail payment due to petitioner. This offset was duly effected on May 28, 1963.

The conclusion that petitioner had been overpaid for the 1953-55 period in question was based on the Board's interpretation of its own earlier Order E-8181 (J.A. 28-31), 18 C.A.B. 490, issued March 24, 1954, which fixed a new final mail rate for petitioner from and after August 7, 1953, and which remained in effect through June 30, 1955 (see 21 C.A.B. 999). This order provided that petitioner's mail pay should thereafter be computed on a formula which included as one element "scheduled miles flown," which the order defined as follows:

> "[T]he scheduled miles flown shall be computed on the direct airport-to-airport mileage between points actually served on each trip flown in scheduled service with DC-3 aircraft, including all trips operated as extra sections thereto." (J.A. 31) (Emphasis supplied).

The terms "trip" and "extra section" were not further defined in the order.

In setting petitioner's new mail rate formula in Order E-8181, the Board reduced petitioner's estimated break-even need for a future year from the $1,300,884 contended for by the carrier to $981,553 (J.A. 11, 23), largely on the basis of disallowing for subsidy purposes certain proposed schedules which the carrier proposed to fly but which the Board found would unduly depress load factors (J.A. 12-13).[1/] Neither the Board's statement nor the carrier's petition contains any discussion of extra section mileage, but an explanatory note to the

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1/ The "load factor" of a single flight is the ratio of seats filled by revenue passengers to seats available. For a multi-flight operation, it is the ratio of revenue passenger miles to available seat miles (J.A. 31).

tables indicates that this figure was expected to remain constant at the existing level (J.A. 24).

The subsidy formula, designed to cover petitioner's estimated break-even need and give it an 8% return after taxes, contained two factors. The first factor gave petitioner what was in effect the flat sum of $3,838.45 per day.[2] The second factor, to be subtracted from the first, operated to share the benefits of increasing load factors between petitioner and the government; as petitioner's load factors increased above a base level of 42%, its subsidy would be reduced as its rate of profit went up.[3] The net effect of this sliding-scale formula, under petitioner's actual operating conditions, was that every additional scheduled mile flown with 8 or fewer passengers aboard one of petitioner's DC-3's would increase petitioner's subsidy, while every scheduled mile flown with 9 or more passengers aboard would reduce it.[4]

2/ This was because, as anticipated, petitioner's actual mileage each month always averaged more than the base figure of 5500 miles a day (J.A. 82-83, lines 1 & 10). See Appendix B, infra, p. 49, for greater detail on the mathematics of this formula.

3/ Under this formula, the Board estimated a 42% load factor would give petitioner an after-tax return of 2.73%; the forecast load factor of 51.64% would give it the stipulated 8.00%; while a 60% load factor would give it a 12.59% return (J.A. 20). During the period in question petitioner's monthly load factors varied from a low of 46.58% to a high of 80.28%, for an average of 62.30% (J.A. 82-83, line 7).

4/ On a 21-passenger DC-3, 8.82 passengers represent a load factor of 42%. See Appendix B.

While Order E-8181 was under consideration by the Board, the functions of disbursing the subsidy element of mail pay, and of auditing the carriers' claims therefor, were transferred from the Post Office to the Board, effective October 1, 1953 (67 Stat. 644).[5/] By a circular letter of that date, the Board advised all carriers of the procedures to be followed in presenting claims for subsidy mail pay (J.A. 101-104). Shortly thereafter, on October 13, 1953, the Board sent out "Instruction Letter No. 1," requesting all carriers to furnish certain information needed to facilitate future Board field audits of subsidy claims (J.A. 104-07). Among other items, the carriers were asked to furnish "a detailed description of procedures used for authorizing extra sections of regular flights" (J.A. 105); they were further advised that, "Part of the audit will include verification of extra section flights." (J.A. 106.) Petitioner submitted the requested information 7½ months later, two months after Order E-8181 became final (J.A. 34).

The first field audit by Board personnel of petitioner's subsidy mail pay claims took place during the summer of 1955. While this audit was under way, the Board circulated to all carriers its "Standard Practices Letter No. 15," dated June 15, 1955, concerning proper reporting practices (J.A. 107-09). One paragraph instructed the carriers as follows (J.A. 108):

5/ See also Service Mail Rates, Reorganization Plan No. 10, 17 C.A.B. 898, 901 (1953). During the period here in question, 95 percent of petitioner's total mail pay was subsidy (J.A. 83, lines 12-13).

> "Extra section flight. Extra section flights are those operated to accommodate overflow traffic from regularly scheduled flights and should be reported as revenue miles in scheduled service. Flights made in ferrying aircraft to meet schedules, or for similar operational reasons, are not extra sections and should be reported as non-revenue flights even if an occasional shipment of revenue traffic is on board as a matter of special accommodation." (Emphasis added.)

Shortly thereafter, the Board's auditors discovered for the first time that petitioner had been making a practice of listing as extra sections, and claiming increased subsidy for, many flights which were neither regularly scheduled nor put on to carry overflow traffic from such flights. On a large number of these flights, in fact, no passengers whatever were carried. Petitioner, it appears, frequently experienced overflow traffic demand in one direction but not in the other over various of its routes. Its practice was to schedule an extra section in the prevailing direction to carry the overflow traffic; then, rather than leaving the aircraft out of position for its next scheduled movement, or treating the return as a ferry flight, the carrier would designate the return as an extra section also, even though no excess demand existed or was expected in that direction.[6/]

By letter dated November 7, 1955 (J.A. 31-33), petitioner was notified that the Board took exception to this practice (of which

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6/ Depending upon the location of available aircraft, the "return" portion of the so-called "round trip extra section" was performed in some cases before and in other cases after the portion required to carry overflow traffic from a regularly scheduled flight.

the Board had had no prior knowledge, J.A. 95) of classifying non-passenger-carrying ferry flights as extra sections. The Board requested that immediate steps be taken to halt the practice, and warned petitioner that adjustment of its past mail pay claims was under consideration (J.A. 31-33).[7] In a subsequent letter the Board observed (J.A. 40):

> "The position taken by the Board soon after the adoption of the sliding scale, passenger load factor formula was that the term 'extra section' referred basically to a flight which is operated, for traffic purposes only, as part of the carrier's schedules in order to accommodate traffic which cannot be handled on the regular flights."

Throughout the ensuing controversy (in which a number of other carriers were involved) the Board gradually relaxed the tests it proposed to apply to claimed past-period "extra sections" which carried only a small number of passengers; but it never changed its viewpoint that zero-passenger flights could not be claimed for subsidy purposes.[8]

7/ Petitioner incorrectly states (Pet. Br. 6) that it was first warned of the proposed adjustment of past claims in 1957.

8/ The Board proposed to approve on audit only those claimed extra sections which carried a certain minimum number of passengers over some segment of the one-way flight. The three tests successively proposed by the Board were as follows:

The "combined load factor" test. Under this the number of passengers on the extra section must have exceeded the vacant seats on the related regular section; i.e., there must actually have been an overflow (J.A. 40-41). Estimated overpayment to petitioner, applying this test: $50,000 (J.A. 42).

(footnote continued)

In its final letter explaining its proposed offset action (the alleged "order"), the Board again reaffirmed its rejection of zero-load-factor flights as bona fide "extra sections." Since Order E-8181 does not define that term, the Board said, meaning must be given to it in the light of the order's overall purpose and intent. The letter continued:

> "The Board has always considered that for a flight to be an extra section it must have been operated in relation to a scheduled flight, and it must be operated for a revenue producing purpose as distinguished from an operational purpose. Flights flown for positioning or for other operational purposes are considered to be ferry flights rather than extra sections. For example, a flight flown to position an aircraft in order to operate a scheduled flight would not qualify as an extra section, and we do not understand that you contend otherwise. By the same token, the fact that extra section flights are included in the subsidy computation does not mean that positioning flights flown in connection with such extra sections are to be included in the mail pay computation.
>
> "To determine whether a particular flight has a revenue purpose and qualifies as an extra section, the test adopted is at once simple and objective, namely, whether there was in fact any revenue passenger traffic carried on the flight. It seems self-evident that a flight which does not carry any revenue traffic and which is not required by a schedule could not have a revenue purpose." (J.A. 92-93.)

The four-passenger test. The extra section must have carried at least four passengers (J.A. 45-46). Overpayment to petitioner, as computed: $25,255 (J.A. 50).

The one-passenger test. The extra section must have carried at least one passenger (J.A. 81). Overpayment to petitioner: $18,204.16 (J.A. 82-83).

It will be noted that extra section miles disallowed for 12 of the 21 months in question were based on actual audit figures, while those for the remaining nine months are projected by a percentage method (J.A. 84-85). Petitioner has never challenged the propriety of this method or the validity of the resulting figures.

The Board's letter rejected as purely subjective the standard proposed by petitioner; it likewise rejected petitioner's argument that a positioning flight could be combined with a bona fide extra section to make a "round trip." Rejected, too, was the argument that existing Board regulations required the flights in question to be classified as "extra sections;" on the contrary, said the Board, the language of these regulations indicated that such flights should have been classified as "non-revenue flights incident to" extra sections.

The Board also found petitioner's contention that zero-load-factor extra section miles were included in petitioner's base-year figures irrelevant if true;[9/] "the carrier's reporting practices were its own doing and were without knowledge on the part of the Board or its staff." In any event, the Board held, Order E-8181 cannot now be reopened to correct petitioner's unilateral error. Moreover, readjustment of the base-year figures would not necessarily result in equal or increased subsidy; on the contrary, since the petitioner's reported extra section miles during 1953-55 greatly exceeded those forecast in Order E-8181, excluding ferry flights from both sets of figures would probably result in less subsidy, not more.

9/ Petitioner has admitted that it has destroyed all records which might have proved this assertion (J.A. 73).

The Board accordingly withheld $18,204.16 from petitioner's regular monthly subsidy check on May 28, 1963, and petitioner thereupon filed this petition for review.

The Board moved to dismiss for lack of jurisdiction; this Court denied the motion without prejudice to its renewal here. Since there exists no "record" in the usual sense (except as to Order E-8181), the Board, in lieu of the customary transcript of record, certified to the Court the file of correspondence between the parties, together with Order E-8181 and certain other materials believed relevant (J.A. 113).

STATUTES INVOLVED

Relevant portions of the Civil Aeronautics Act, Federal Aviation Act, Administrative Procedure Act, Transportation Act of 1940, and Judiciary Code are set forth in Appendix A hereto (infra, pp. 39-47).

SUMMARY OF ARGUMENT

I

The Board's letter of May 15, 1963 is not a reviewable order because it had no independent legal effect on petitioner. The Board did not purport to adjudicate petitioner's rights; it merely employed the ordinary right of offset, available to any creditor, which was expressly reserved to the government by section 322 of the Transportation Act of 1940. The Board's interpretation of its prior order is not in itself reviewable, because it fixes no legal rights or liabilities. Moreover, this Court has no foundation upon which to

exercise its power of appellate review, because there is no proper record encompassing the disputed factual issues, and the Board was not required by law to formulate such a record. In any event, petitioner's remedy lies in the Court of Claims under 28 U.S.C. 1491.

II

The Board's action here must be tested by its faithfulness to the original intent and purpose of Order E-8181, which could not be retroactively amended. The Board's interpretation of the term "extra section" in that order is reasonable; it conforms to the natural meanings of the words used, to the Board's prior regulations and other pronouncements, and to the purposes of the sliding-scale subsidy formula in general and of Order E-8181 in particular. Petitioner's interpretation is unreasonable, inconsistent, and tends to defeat those purposes. It is, in short, a device designed to increase petitioner's subsidy, which the Board rightly rejected. The Board's interpretation is entitled to great weight; petitioner admits it is reasonable; it should prevail.

III

It was proper for the Board, upon auditing petitioner's subsidy claims, to apply its own reasonable definition of "extra sections" in disallowing petitioner's no-passenger flights. Petitioner cannot claim to have relied on any earlier ruling or interpretation by the Board, nor on the Board's payment of its claims upon presentation, since by explicit statutory provision these were paid subject to

later audit. Petitioner's claim that it disclosed its reporting practice to the Board in May 1954 is unfounded. Its reliance solely on its own undisclosed interpretation cannot estop the government. Even if ferry flights were included in petitioner's base-year figures (which is not established), it is pure speculation how timely disclosure of this fact would have affected petitioner's subsidy formula. Indeed, because its reported extra section mileage doubled thereafter, a base-period adjustment would presumably have reduced its subsidy, not increased it.

ARGUMENT

Introduction

The relationship of the Board's actions here challenged to its earlier Order E-8181 requires clarification at the outset. Petitioner repeatedly asserts that the Board has undertaken to reopen and amend that order retroactively. But the Board has not purported to do anything of the kind, and is well aware of its lack of power to do so. All that the Board has done has been to interpret and enforce that order in accordance with its original intent and meaning. In the first section of this argument we will show that there is no reviewable order here because the Board merely exercised its statutory power of offset in line with its interpretation of its own earlier order, and because petitioner's remedy against this offset lies not here but in the Court of Claims. In the concluding sections we will show that, if the Court reaches the merits, it should uphold the Board's interpretation and application of the earlier order.

I. This Court lacks jurisdiction to review the actions of the Board here at issue

A. The Board's letter of May 15, 1963 is not a reviewable order because it had no independent legal effect on petitioner

Section 1006 of the Federal Aviation Act (infra, p. 41) authorizes the Courts of Appeals to review "[a]ny order, affirmative or negative, issued by the Board . . . under this Act . . ." The Board's letter of May 15, 1963 is no such "order."[10/]

The fundamental requirement for agency action to be reviewable under section 1006 is that it must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 112-113 (1948); and see United States v. Los Angeles & S.L. R. Co., 273 U.S. 299, 309-10 (1927). The Board's letter did none of these things. It commanded no action by petitioner, forbade no action, denied no license or permission, fixed no status. Nor did it affect petitioner's relationships with third parties.

Petitioner asserts that the letter constitutes a "determination of Petitioner's rights" to the $18,204.16 subsequently withheld from it.

10/ Petitioner appears to have abandoned the contention made in its answer to the motion to dismiss that jurisdiction may be independently premised on section 10 of the Administrative Procedure Act. Absent specific statutory provision therefor, the petition for review is not an "applicable form of legal action" under section 10(b), nor is this Court a "court of competent jurisdiction" to entertain original actions thereunder. Schwab v. Quesada, 284 F. 2d 140 (C.A. 3, 1960); City of Dallas v. Rentzel, 172 F. 2d 122, 123 (C.A. 5, 1949); cf. United States v. Agne, 161 F. 2d 331 (C.A. 3, 1947).

To "fix some legal relationship" (Chicago & Southern, supra), the letter must have been more than merely an expression of the Board's opinion or a notification that the Board intended to exercise its right of offset. Here, all the Board purported to do was to set forth its interpretation of the terms used in Order E-8181, a mail rate order which it treated as final for all purposes. Unlike a determination of the statutory "reasonableness" of petitioner's mail rates,[11] this mere interpretation would be no more binding upon a court in a collateral suit than it is upon this Court; in neither court would it be binding if the court found it to be contrary to the original intent of the order interpreted. See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); United States v. New York, N.H. & H. R. Co., 355 U.S. 253, 264 (1957); Pike v. Civil Aeronautics Board, 303 F. 2d 353, 357 (C.A. 8, 1962).

A mere statement of the Board's interpretation of Order E-8181 does not in itself serve to make the letter a reviewable order. This Court has repeatedly held unreviewable agency interpretive statements which are not part of orders which determine legal rights. American President Lines v. Federal Maritime Commission, ___ U.S. App. D.C. ___, 316 F. 2d 419 (1963); California Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 239 F. 2d 426 (1956);

11/ Such as was involved in United States v. Jones, 336 U.S. 641, 644-6 (1949); Pennsylvania R.R. v. United States, 363 U.S. 202 (1960); Davidson Transfer & Storage Co. v. United States, 164 F. Supp. 571 (D.C. Md. 1958), all cited by petitioner; and see Capital Airlines v. United States, 90 F. Supp. 926 (Ct. Cl. 1950); Capital Airlines v. United States, 113 F. Supp. 641 (Ct. Cl. 1953).

Helco Products Co. v. McNutt, 78 U.S. App. D.C. 71, 137 F. 2d 681 (1943); John P. Agnew & Co. v. Hoage, 69 U.S. App. D.C. 116, 99 F. 2d 349 (1938).

The nub of the matter is that petitioner is aggrieved by what the Board did, not by what it said -- by the offset, not by the explanatory letter. Clearly, the letter without the offset would not have affected petitioner at all. The offset without the letter would certainly have affected petitioner; yet we do not understand that even petitioner claims that the offset standing alone would be reviewable under section 1006. The Board need not even have written the letter; as we will show, it was authorized to make the offset without a hearing, and without an order. Indeed, the offset could have been made by the Post Office or General Accounting Office, in which case there could be no claim of jurisdiction under section 1006. 12/

Petitioner's confusion, in viewing the Board's letter as an "order," we submit, arises from its failure to distinguish between the two quite different functions which the Board performs in mail-pay matters: (1) its function of fixing mail rates, and (2) its function of paying, auditing, and settling carriers' claims.

The Board fixes mail rates by formal orders, such as Order E-8181, entered on a record after notice and hearing. Any such order, of course, is reviewable in this Court under section 1006.

12/ Prior to 1953, the offset could only have been so made, since the Post Office, not the Board, performed the paying function (supra, p. 4).

No such formal adjudicatory procedure is required by law, however, for the auditing and settlement of carriers' claims arising under such a mail rate order.[13] The power to offset the amount of an overpayment to a carrier against sums subsequently becoming due to that carrier, here exercised by the Board, is declared in section 322 of the Transportation Act of 1940 (infra, p. 45), which in pertinent part provides:

> "Payment for transportation of the United States mail . . . by any common carrier subject to . . . the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." 14/ (Emphasis added.)

The First Circuit observed, in United States v. New York, N.H. & H. R. Co., 236 F. 2d 101, 105 (C.A. 1, 1956), rev'd on other grounds 355 U.S. 253 (1957), that the government under this section is authorized to utilize the common right of offset available to any creditor. Accord, United States v. DeQueen and Eastern R. Co., 271 F. 2d 597, 600 (C.A. 8, 1959). In acting under this section to recapture an overpayment, the Board acts simply as the paying-auditing agent for

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13/ Most of what petitioner receives from the government is subsidy, but Congress chose to use mail pay as the vehicle for extending such subsidy. Sections 401(1), 405(d), 406(a)-(c) of the Federal Aviation Act, infra, pp. 39-41.

14/ The section is quoted as it stood prior to 1958. The 1958 amendment, 72 Stat. 860, 49 U.S.C. 66 (1962 Supp.), imposing a 3-year statute of limitations, does not affect this case since it applies only to transactions after its effective date.

the government as shipper.[15] There is no suggestion that the Board's determination of the amount overpaid must be made after a hearing and upon a formal record. Apposite here is the language of the Ninth Circuit in Richfield Oil Corp. v. United States, 209 F. 2d 864, 870 (C.A. 9, 1953):

> "What we deal with here is no different in essence than a communication which the Government might send to a person with whom it has a contract saying: 'We have overpaid you $75,000 and we want that amount refunded.' It would indeed be surprising if every time a governmental agency notifies a contractor of the agency's views as to a contractor's obligations, the latter may undertake to reverse such agency action by a proceeding under the Administrative Procedure Act. No piecemeal and day-to-day revision of such routine administrative functions was contemplated when this Act was enacted."

While Richfield holds only that such an agency letter is not an order reviewable under the Administrative Procedure Act, the same principle obviously applies here under section 1006.[16]

B. Since there is no proper record, and since the Board was not required to hold a hearing to create such a record, this Court cannot provide appellate review

It is well established that, to be reviewable under section 1006 of the Act, an "order" must be the outcome of a quasi-judicial

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15/ Section 1006 of the Federal Aviation Act (infra, p. 41) gives this Court jurisdiction to review "any order . . . issued by the Board . . . under this Act" (emphasis added). Since here the Board acted under the above-quoted section of the Transportation Act, a strong argument can be made that section 1006 is inapplicable. Cf. Schwab v. Quesada, 284 F. 2d 140 (C.A. 3, 1960); City of Dallas v. Rentzel, 172 F. 2d 122 (C.A. 5, 1949).

16/ The amount of the overpayment had not been finally determined in Richfield; however, it is clear from the opinion that nothing turned on this fact.

adjudicatory proceeding resulting in a "record" when there are disputed factual issues. Arrow Airways, Inc. v. Civil Aeronautics Board, 87 U.S. App. D.C. 71, 182 F. 2d 705 (1950);[17] Division of Production v. Halaby, 307 F. 2d 363 (C.A. 5, 1962). These cases in turn rely on United Gas Pipe Line Co. v. Federal Power Commission, 86 U.S. App. D.C. 314, 181 F. 2d 796, 799 (1950), cert. denied, 340 U.S. 827, where this Court held:

> "[A]n appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues."

These cases proceed on the premise that when no record has been formulated with respect to disputed factual issues -- and when there is no legal requirement that the agency make such a record -- such issues must be resolved by a court competent to hear and weigh evidence. In Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 384 (1938), the Supreme Court cited similar language in the Federal Power Act as establishing that its review provision "relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

In the present case, there are facts in dispute which petitioner claims are material (the Board denies their materiality).[18]

17/ Arrow was decided under the parallel section of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U.S.C. 646 (1952 ed.).

18/ Petitioner states (Pet. Br. 26) that it is a purely legal issue "whether, under the circumstances of this case, the Board's action is arbitrary." This is rather disingenuous, since it is

(footnote continued)

Yet the only "record" the Board could file, in addition to Order E-8181, consists of its correspondence with petitioner (all unsworn, naturally), plus certain of its regulations and circular letters. If the Court were to consider the merits, it would have no way of determining whether the Board's resolution of the factual issues was supported by "substantial evidence in the record."[19] The above-quoted passage from the United Gas case is pointedly applicable, and clearly shows that this is not a case for an appellate court.

Petitioner offers the obviously fallacious argument (Pet. Br. 27) that all factual disputes must be deemed to have been resolved in its favor. The cases it cites certainly do not support any such contention; they hold only that for purposes of a motion to dismiss, facts well pleaded in a complaint or petition for review must be treated as true. Inspection of the petition here (J.A. 109-12) shows that its allegations fall far short of covering the above-cited factual disputes.

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precisely the alleged "circumstances" which are factually in dispute. These "circumstances" include such matters as how long petitioner had been following its challenged extra section reporting practice; whether this practice had had any effect on the mail rate fixed by Order E-8181, and if so how much; whether or not Board personnel had knowledge of this practice; what load factors petitioner's extra sections had achieved, etc. While the Board did not and does not consider petitioner's factual assertions as to these matters material even if true (see infra, pp. 32-37), petitioner did and does -- indeed, much of its case on the merits is based on them.

19/ To be sure, formal pleadings and affidavits may in appropriate cases constitute an adequate record for appellate review, Springfield Airport Authority v. Civil Aeronautics Board, 109 U.S. App. D.C. 197, 285 F. 2d 277 (1960); but here the Court would not have even this much to go on.

To be sure, an agency cannot defeat judicial review by denying a hearing where one is required by law; in such a case the appellate court needs no record, since its sole function is to order a hearing held.[20] But here, as we have seen, the government took an action which requires no hearing and which does not finally determine petitioner's rights to the money in question. Thus, petitioner's suggestion that the case be returned to the Board for a hearing is entirely inappropriate, since it would contravene the Transportation Act's policy of allowing the government to recapture overpayments by administrative offset, rather than on the basis of an adjudicatory proceeding.

In any event, to permit the petitioner to obtain payment of money it considers to have been wrongfully withheld by requiring the Board to hold an adjudicatory proceeding would be, in effect, to allow a suit against the United States in a manner not authorized by it. Indeed, petitioner appears to recognize this in its petition for review by requesting only that the "order" be set aside, and not that the withheld sum be ordered paid to it (J.A. 112). Clearly, the mere "setting aside" of the Board's letter would not afford

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20/ See American Sumatra Tobacco Corp. v. Securities & Exchange Commission, 68 U.S. App. D.C. 77, 93 F. 2d 236 (1937), cited by petitioner. On the other hand, where no hearing is required, the order is not made reviewable simply because one is in fact held; see Mallory Coal Co. v. National Bituminous Coal Commission, 69 U.S. App. D.C. 166, 99 F. 2d 399, 408 (1938), where this Court said: "Short cuts to judicial review are not intended by Congress or encouraged by the courts."

petitioner the relief it really wants. The only proper forum in which petitioner may seek this relief -- the forum authorized by Congress -- is the Court of Claims.

C. Petitioner has an adequate remedy in the Court of Claims

This case is essentially no different from any other dispute between the government and a carrier over charges for transportation. Petitioner filed claim for a certain sum for the month of April, 1963, but received $18,204.16 less because of the offset. Its remedy plainly lies in a suit against the United States in the Court of Claims under 28 U.S.C. 1491.[21/] See United Fruit Co. v. United States, 168 F. Supp. 549 (Ct. Cl. 1958).

Petitioner insists that the Court of Claims will not have jurisdiction to grant it relief because that court cannot review an order fixing mail rates, United States v. Jones, 336 U.S. 641, 669 (1949). This is true but irrelevant, since the challenged action of the Board is not an order fixing mail rates. Neither petitioner nor the Board disputes the validity of Order E-8181, nor the fact that the proper interpretation of that order is determinative of the present dispute. Consequently, if part of the mail pay called for by that order has been improperly withheld by the Board because of an error of law or of fact, the Court of Claims can enforce the order and enter judgment

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21/ Another carrier against which the Board made an "extra section" offset filed suit in the Court of Claims under this section. Eastern Air Lines, Inc. v. United States (Ct. Cl. No. 207-60, dismissed on May 17, 1963, after settlement between the Board and the carrier).

for the amount so withheld. United States v. Jones, supra; United States v. New York Central R. Co., 279 U.S. 73 (1929). That court will, of course, be bound neither by the Board's view of the facts nor by its interpretation of the earlier order.[22] See New York, N.H. & H. R. Co. v. United States, 272 F. 2d 333 (C.A. 1, 1959). Thus petitioner's remedy is complete and adequate.

II. The Board's interpretation of the terms of its own prior mail rate order, being reasonable and consistent, should be upheld by this Court

On the merits, petitioner rests its whole case on its assertions that "during the period involved, there was no definition of extra section mileage in effect contrary to the one followed by petitioner" and that its definition was "reasonable" (Pet. Br. 12).[23] But even if accurate (which they are not), these assertions would not be decisive or even relevant. On the contrary, the Board's definition is the presumptively correct one which should be accepted by the courts, notwithstanding any claim that another definition would be equally

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22/ Pennsylvania R.R. v. United States, 363 U.S. 202 (1960), cited by petitioner, was held properly commenced in the Court of Claims. The sole issue which it was held that court could not pass on, and which had to be referred to the Interstate Commerce Commission, was whether certain rates were "just and reasonable" -- a quasi-legislative determination. No such issue is present here. Accord, Davidson Transfer & Storage Co. v. United States, 164 F. Supp. 571 (D.C. Md. 1958) (suit in district court under Tucker Act, 28 U.S.C. 1346(a)(2)).

23/ Petitioner itself admits that the Board's interpretation is reasonable for the future, although not for the past (Pet. Br. 17).

reasonable.[24] We propose to demonstrate, in any event, that the Board's interpretation is faithful to the intent of Order E-8181 and prior Board policies, while petitioner's is not. If the Court reaches the merits, therefore, the Board's action should be affirmed.

A. The Board's interpretation, unlike petitioner's, is consistent with the ordinary meaning of the words used and with the Board's prior pronouncements

Firstly, an "extra section" is always an extra section of a particular regularly scheduled flight.[25] The word "section" implies an integral part of a whole; an "extra section" implies a second planeload of passengers comprising part of essentially a single flight. Adding an extra section to a flight is like adding an extra car to a railway train, except that it is impossible to couple two airplanes together, so that each must fly independently.

All airlines -- including petitioner -- use the term "flight" to denote a one-way unit of transportation service. A passenger may purchase a round-trip ticket from A to B and back; but he goes on one flight, and returns on another separate flight. So too, the same aircraft may fly from A to B and then return to A, but petitioner's

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24/ Outland v. Civil Aeronautics Board, 109 U.S. App. D.C. 90, 284 F. 2d 224, 228-9 (1960); Danielson v. Civil Aeronautics Board, 204 F. 2d 266, 268 (C.A. 2, 1953); and see Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Baxter v. Macy, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 17,519, slip opinion, December 12, 1953).

25/ The Board's accounting regulations in force during the period in question speak repeatedly of "regular trips and extra sections of scheduled passenger flights" (J.A. 97) (emphasis added), and like phrases. Uniform System of Accounts for Air Carriers, 14 C.F.R. 241.7-2 (rev. 1952). Similarly, "Instruction Letter No. 1" speaks of "procedures used for authorizing extra sections of regular flights" (J.A. 105) and of "extra sections operated in connection with regular flights" (J.A. 106).

schedules, like those of any carrier, will show the two movements as two different flights, having separate flight numbers.[26/]

Since regularly scheduled flights in opposite directions are thus distinct flights, even if performed by the same aircraft, extra sections of such flights in opposite directions are necessarily likewise distinct. Consequently, there can be no such thing as a "round trip extra section," as petitioner claims. Either there are two successive extra sections, one in each direction, each independently satisfying the definition of that term; or, as here, there is a bona fide extra section in one direction and a ferry flight in the other, lumped together only for the purpose of claiming additional subsidy. Thus, petitioner's claim of "round trip extra sections" is illogical and inconsistent with the common parlance of the airline industry. The use of such an artificial term reflects a realization on petitioner's part that its no-passenger "extra sections" could not bear scrutiny on their own merits, and needed the protection of being lumped in with the bona fide extra sections in the opposite direction.

Secondly, the purpose of an "extra section" is necessarily to carry overflow traffic from the regular section. A carrier may add an extra frequency to acquire passengers desiring to travel at a

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26/ Exceptions to this rule are round-the-world flights and tour flights, where a group of passengers make sight-seeing stopovers at a number of cities and then return to their point of origin. In some rare instances, scheduled commercial flights follow circular routes. None of these exceptions are relevant to the present case.

different time of day; the only reason for adding an extra section, however, since it operates at the same time of day, is to carry passengers who cannot be accommodated on the regular section. While "extra section" was not thus explicitly defined in the Board's regulations prior to "Standard Practices Letter No. 15" of June 15, 1955 (J.A. 108), such a purpose was always implicit in the term itself.

In the Board's earlier pronouncements, furthermore, the words "extra section" are frequently associated with the word "revenue" in such a way as to indicate that an extra section must be a revenue flight. Thus, Carrier Payments Memorandum No. 1 of October 1, 1953 speaks of "all extra section and other revenue flights" (J.A. 104) (emphasis added). Similarly, compare the item definitions for Schedule C-1, lines 1-9 and 34-38, in the Board's contemporaneous accounting regulations (J.A. 96-97, 100-101). And see the definition of "scheduled service" in these regulations (J.A. 96), which for clarification may be rewritten as follows:

> "Scheduled service means -
>
> (1)(a) all revenue flights operated over the air carrier's certificated routes pursuant to published flight schedules and
>
> (b) all flights operated as extra sections thereto, and
>
> (2) all non-revenue flights incident to the revenue flights so defined."

This definition plainly implies that extra sections are part of the "revenue flights so defined" referred to in clause (2), and therefore must themselves be "revenue flights."

In accepted usage, a "revenue flight" is a flight whose primary purpose is to carry paying traffic.[27] Petitioner does not deny this; it claims, however, that it made an effort to sell seats on all of its "extra sections," so that all of them had a revenue purpose and should be counted as revenue flights. But this argument is not compelling. When the regular flight in the return direction is not and is not expected to be sold out, as was admittedly the case here, there is no revenue purpose in diverting passengers to an extra section. Petitioner presented no evidence that the "return" portions of its claimed "round trip extra sections" ever carried any passengers who would not have otherwise taken the regular flight. The flights actually disallowed, of course, carried no passengers at all. The Board, consequently, was justified in finding (J.A. 93) that positioning, not revenue, was the predominant purpose of these flights, and that they could not qualify as "extra sections" under Order E-8181.

In an effort to convince the Court that the Board was legislating, rather than simply interpreting Order E-8181, petitioner repeatedly asserts that the Board "twice redefined" extra sections, and implies that these alleged redefinitions are mutually contradictory and therefore arbitrary.

27/ In some sense, of course, every flight by a commercial carrier -- even a training or maintenance flight -- is a "revenue flight," in that it is an indispensible part of an operation whose ultimate goal is the production of revenue. But that is not the sense in which this term is used here, or in the Board's accounting regulations, or in general parlance.

The facts are quite different. The Board's definition of an extra section, first explicitly set forth in June 1955 in "Standard Practices Letter No. 15" but always implicit prior to that time, has not changed in any material respect, particularly as affects the flights here at issue (cf. J.A. 92-93). What did change was the Board's practical rule-of-thumb for determining which flights of a past period had in fact been "operated to accommodate overflow traffic from regularly scheduled flights" (J.A. 108); but that change cannot benefit petitioner now.

The first test proposed by the Board -- the "combined load factor" test (J.A. 40-41) -- implemented the definition stated in "Standard Practices Letter No. 15," since it tested whether or not a claimed extra section had in fact carried passengers who could not physically have been accommodated on the related regular flight. In our view, the Board would have been fully justified in enforcing the "combined load factor" test, as it first proposed. Instead, the Board chose, largely for reasons of administrative feasibility,[28] to allow for subsidy purposes those claimed past-period extra sections which did not satisfy the "combined load factor" test but had carried some passengers, thereby ultimately reducing the amount of overpayments charged to petitioner by two-thirds.

28/ The "combined load factor" test is time-consuming to administer, both for the Board and for the carrier, especially if provision is made to allow the carrier to justify extra sections where combined reservations exceeded the capacity of the regular flight but last-minute cancellations brought the actual combined load factor below 100% of that capacity.

On the points here directly at issue, however, the Board's stand has never varied; it has always rejected petitioner's concept of the "round trip extra section," and it has never accepted for subsidy purposes claimed extra sections which carried no passengers on any segment of the one-way flight. This is the stand which the Board now asks this Court to uphold if it reaches the merits.

B. The Board's interpretation is consistent with the purposes of the subsidy system and of Order E-8181 itself; petitioner's interpretation operates to defeat those purposes

The Board in distributing subsidy mail pay must balance the interests of the carriers and the communities served against the interests of the taxpayers in keeping the total subsidy bill within reasonable bounds. It by no means considers itself obligated to subsidize as many flights as the carriers or their customers might like to have operated. It clearly demonstrated this in arriving at the subsidy formula of Order E-8181, when it refused to underwrite several proposed additional schedules which it found would unduly depress load factors (J.A. 12-13). Thus petitioner had no reason to suppose that the Board would accept devices to increase its subsidy by adding mileage which would artificially dilute load factors.

That petitioner's inclusion of return ferry mileage in its subsidy claims is just such a device may be seen from the following hypothetical case: Suppose that revenue passengers occupied 14 of the 21 seats on a particular 500-mile extra section flight, for a healthy load factor of 66-2/3%. Under the formula of Order E-8181,

as intended by the Board, petitioner's subsidy would be reduced by $111, while it would still earn an increased return on its investment. However, if the empty return flight is also treated as an extra section, as under petitioner's theory, the average load factor for the two flights together is reduced to an anemic 33-1/3%, and petitioner's subsidy claim, instead of being reduced, is increased by $78. 29/

Petitioner, however, argues that the cost of ferrying aircraft back empty is a necessary part of the cost of operating extra sections to carry one-directional overflows, and therefore that the return mileage should be allowed for subsidy purposes. But a certain amount of ferry (and other non-revenue) mileage is always necessary to the operation of any airline; yet there has never been any question of including ferry or other non-revenue flights in "scheduled miles flown" for the purposes of the sliding-scale subsidy formula. In view of this and what had gone before, petitioner had no reason whatever to expect that the Board would be willing to pay increased subsidy for ferry flights incident to extra sections.

Petitioner nevertheless insists that the Board had no right to later disallow its no-passenger "extra sections," because, it claims,

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29/ See Appendix B, infra, p. 50, for the derivation of these figures. In fact, when the aircraft returns empty, petitioner would have to have at least 18 passengers aboard the forward flight (84% load factor) in order to avoid increasing its subsidy claim. It may very well be doubted whether the forward portion of many of petitioner's so-called "round trip extra sections" achieved this extremely high load factor; certainly petitioner has made no showing to that effect.

its so-called "extra section operation" as a whole achieved a high load factor.[30] But there is no reason whatever why the Board should be required to treat this so-called "operation," actually consisting of a large number of unrelated individual flights, including two very different types of flights, as a single indivisible unit. On the contrary, just as the Board had a right to determine which of petitioner's proposed new schedules it would underwrite with subsidy, so it had every right to treat each type of claimed extra section on its own merits, approving those which fell within the intent and purpose of Order E-8181 and rejecting those which did not.

As we have seen (supra, p. 3), the express purpose of the second factor in the sliding-scale subsidy formula was to share the benefits of increasing load factors between the carrier and the government, by reducing the government's subsidy burden while yet allowing the carrier an increased rate of return. As the Board said in its final letter (J.A. 95), it would expect an efficient carrier

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30/ Actually, it is dubious whether the overall load factor of petitioner's "extra section operation" was as high as petitioner implies. Certainly there is no evidence to that effect in this "record." We do know that about 20% of its claimed extra section flights carried no passengers (J.A. 84-85), 28% carried 3 or less (J.A. 49), and apparently less than half met the combined load factor test (compare J.A. 49-50 with J.A. 42). Petitioner's earlier claim (J.A. 35), that its extra sections broke even without benefit of subsidy, cannot possibly be true, since petitioner's break-even load factor without subsidy would be at least 76% (figure derived from J.A. 23), which could not possibly be achieved by its claimed extra sections as a group in view of the number of empty or near-empty flights included.

to operate extra sections only when it could do so at a high load factor. Indeed, the whole purpose of including extra sections in the subsidy formula was precisely to increase load factors and thereby to reduce petitioner's subsidy. It is absurd, therefore, for petitioner now to speak as if it suffered some kind of "penalty" when its high-load-factor extra sections reduced its subsidy, since that was precisely what the order contemplated.

In a last effort to justify its position, petitioner says that other carriers followed the same practice until forbidden by the Board.[31/] This proves only that all carrier managements would rather be paid a subsidy for ferrying their aircraft than not. The number of persons who try out a loophole is no test of its validity.

III. The Board acted reasonably in partially disallowing petitioner's past subsidy claims

In addition to contesting the validity of the Board's interpretation of Order E-8181, petitioner argues that, for a number of reasons, it was inequitable, and therefore arbitrary and capricious, for the Board to disallow extra section mileage already flown. Several of the equitable considerations advanced by petitioner have been dealt with in the preceding section, since they went more to the validity of the Board's interpretation. The remainder are dealt with here.

31/ Since petitioner has cited the practice of other carriers, it is fair to point out that all but two have settled with the Board on the basis of either the four-passenger or the one-passenger test.

A. The Board's interpretation does not represent a change in any prior ruling upon which petitioner can claim to have relied

Petitioner concedes that the Board's interpretation of Order E-8181 is sufficiently reasonable to be applied prospectively, but denies the Board's right to apply it to extra sections already flown (Pet. Br. 17). Petitioner then goes on to cite numerous cases either denying administrative agencies the right to apply newly announced policies retrospectively, or granting them that right only within narrow limits (Pet. Br. 20-24).

All of these cases, however, are quite irrelevant here, since they all involve situations in which an agency sought to reverse retroactively a prior ruling on which an individual had relied,[32] or to establish new standards of conduct stricter than those currently prevailing,[33] or to legislate retroactively.[34] Here, in contrast, the Board has not undertaken to legislate, nor has it sought to establish any new standards of conduct; it has only undertaken to elucidate the original meaning and intent of Order E-8181.

32/ Lesavoy Foundation v. Commissioner, 238 F. 2d 589 (C.A. 3, 1956) (retroactive revocation of tax exemption ruling); NLRB v. Guy F. Atkinson Co., 195 F. 2d 141 (C.A. 9, 1952), and cited NLRB cases generally (changes by the NLRB in its previously announced self-imposed jurisdictional limits).

33/ SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (retroactive imposition of stricter fiduciary standard).

34/ Arizona Grocery Co. v. Atchison, T. & S.F. R. Co., 284 U.S. 370, 389 (1932) (retroactive disapproval of rail rate previously approved); cf. Addison v. Holly Hill Fruit Products, 322 U.S. 607, 619 (1944) (Administrator to define statutory terms retroactively).

Finally, petitioner has not pointed, and cannot point, to any prior ruling or interpretation by the Board on which it can claim to have relied in establishing and continuing its challenged extra section reporting practice. As we have already shown, all the references to extra sections in prior Board regulations and pronouncements support the Board's definition, not petitioner's.

At several places in its brief, petitioner seems to be suggesting that it relied on the fact that its subsidy claims for the period in question were paid on presentation. However, section 322 of the Transportation Act of 1940 (infra, p. 45) expressly requires such payment on presentation, prior to audit; and it equally expressly reserves the right of subsequent audit and setoff.[35] Petitioner was specifically warned that its extra section mileage was subject to audit (J.A. 106); it was the very first audit, indeed, that caught petitioner's practice (J.A. 31-33). Petitioner was certainly not misled in this respect, therefore.

Next, petitioner asserts that the report it filed in response to "Instruction Letter No. 1" put the Board on notice of its extra section reporting practice (J.A. 34). It argues that if the Board had objected to its reporting practice at that time, it would immediately have petitioned for a change in its subsidy formula to produce the same amount of subsidy as before; it contends that the Board's failure to act then should bar such action later.

35/ Needless to say, this system of immediate payment works to petitioner's benefit.

In reality, however, the cited report did not disclose to the Board the features of petitioner's extra section reporting practice here challenged. The references in the last two sentences of this report (J.A. 34) to "round trip revenue potential" - references which were consistent with several alternative possible assumptions about petitioner's extra section scheduling practices - [36] could not overcome the very strong implication of the preceding paragraph that an extra section would not even be considered for scheduling unless the related regular flight was "posted," i.e., sold to capacity. (It is precisely this implication, as we have seen, which proved to be false in the case of the empty "return" portion of petitioner's so-called "round trip extra sections.") Certainly nothing in this report put the Board on notice that petitioner had been and intended to go on claiming subsidy for alleged "extra sections" flown primarily for positioning purposes with no passengers aboard.

36/ These references are consistent with several possible alternative scheduling practices: (1) a practice under which petitioner would schedule extra sections only if overflow demand arose in both directions simultaneously; (2) one under which, if overflow demand arose and an extra section were requested in one direction but not in the other, petitioner would nevertheless take into consideration any incidental revenue which might be derived from the return flight, as well as its costs; (3) one under which, if no revenue could be derived from the return flight, and the aircraft had to be ferried back empty, the revenue of the forward flight would have to cover all costs both ways. All of these practices would be consistent with sound management; none of them would necessarily conflict with the strong inference of the preceding paragraph that an extra section of a regular flight would be scheduled only if that flight had previously been "posted."

Even if the asserted disclosure had been adequate, it is hard to see how this could have barred the Board from later auditing petitioner's books and determining an overpayment. Petitioner cites no authority for an estoppel arising against a government agency on such flimsy grounds. As for petitioner being injured by the Board's failure to react at once, it is pure speculation for petitioner to assume that the Board would have raised its subsidy rate to compensate for the elimination of ferry flights from its figures.

In considering the equities, moreover, it should be noted that petitioner delayed 7½ months in answering "Instruction Letter No. 1." When this request for information went out (prompt rely requested), Order E-8181 was under consideration; by the time petitioner finally replied, that order had already become final and unappealable, and much of the period concerned in the present dispute had already passed.

In the end, petitioner has to fall back on its assertion that it relied on its own interpretation of Order E-8181, and on the fact that the Board had not yet explicitly defined "extra sections." On what possible legal theory any kind of estoppel or equitable bar could arise out of such a reliance, petitioner does not undertake to explain.

Petitioner's position is comparable to that of a taxpayer who, discovering an apparent ambiguity in the tax law, decides not to seek a ruling from the Commissioner, but to order his affairs and file

his returns in accordance with his own private interpretation. When his return is subsequently caught by an auditor, his interpretation is rejected, and a deficiency is assessed against him, such a taxpayer cannot plead "retroactive legislation." Nor can he maintain that the government is estopped either by the alleged ambiguity of its own statute, nor by its failure to catch him sooner, 37/ nor by his reliance on solely his own interpretation.

B. Petitioner's alleged inclusion of ferry flights in its base-year mileage figures gives rise to no equity in its favor

Petitioner has always asserted that, whether the Board knew it or not, petitioner's challenged extra section reporting practice was incorporated into Order E-8181 because the mileage figures on which the formula of that order was based were compiled and submitted by it in accordance with that practice. Elimination of zero-load-factor flights from petitioner's base-year figures, petitioner argues, would have meant spreading the same break-even need over a smaller number of miles, resulting in a formula with large per-mile coefficients which would have produced as much or more subsidy during 1953-55

37/ Of course the government may be barred by a relevant statute of limitations; but that is not a factor here. Prior to 1958 there was no limitation period on the government's right to recapture overpayments from a carrier under 49 U.S.C. 66; and the amendment of that year applies only to transportation performed and payment made after its effective date. Pub. L. 85-762, sec. 3, 72 Stat. 860. Absent an applicable limitations period, the rule is that the government cannot be barred by limitations, laches, or estoppel. United States v. Summerlin, 310 U.S. 414 (1940); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

without zero-load-factor mileage as petitioner actually received with such mileage under Order E-8181 as written. Therefore, the argument goes, it was arbitrary and unjust for the Board to disallow this mileage without going back and readjusting the formula in Order E-8181.

By its own admission (J.A. 73), petitioner has destroyed all records which would show whether ferry mileage was in fact included in its base-year figures, and if so to what extent. As a result, no exact computation of the effect of such inclusion on its subsidy formula is possible.

Even on petitioner's own theory, however, the revised formula of which it speaks would have given it the same total amount of subsidy as it actually received only if its extra section mileage had remained constant at the level projected in Order E-8181. What actually happened, however, was that this mileage doubled.[38/] This greatly expanded extra section operation, with its load factor substantially increased by the exclusion of zero-load-factor return flights, would have weighed more heavily upon the negative second factor than on the positive first factor in the hypothetical revised formula, and would thus have resulted in a distinct reduction in petitioner's subsidy (J.A. 95).

38/ Order E-8181 was based on a projected annual extra section mileage of 77,235 (J.A. 24), or an average of 6,436 a month. Actually, however, petitioner reported a total of 271,185 extra section miles during the 21-month period in question (J.A. 84), or an average of 12,914 a month.

Moreover, it is the purest speculation on petitioner's part to assume that the Board, once informed of petitioner's extra section practices, would have made no adjustments in its projected break-even need in the course of fixing a revised rate. In the light of the adjustments the Board actually did make in Order E-8181, it is at least equally likely that the Board, had it known, would have disapproved of the flying of so much ferry mileage and would have adjusted projected costs accordingly, thus giving petitioner in its revised formula a subsidy-per-mile figure no higher than that of Order E-8181.

The truth is that no one can now possibly know what petitioner's subsidy rate would have been if it had disclosed its extra section practices to the Board while Order E-8181 was under consideration. No such speculation as petitioner suggests is permissible at this late date. When the Board first learned of petitioner's practices, it no longer had the power to reopen Order E-8181 retroactively in order to relieve petitioner of the results of the latter's unilateral reporting mistake. The Board equally lacked the power to achieve the same result indirectly by condoning a distortion of the accepted meaning of the term "extra section" as used in Order E-8181 in conformity with petitioner's erroneous interpretation, as petitioner now desires.

CONCLUSION

For the reasons stated, the petitioner for review should be dimissed for lack of jurisdiction. If the Court reaches the merits, the challenged action of the Board should be affirmed.

Respectfully submitted,

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APPENDIX A

Relevant excerpts from the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C. 1301 et seq.):

TITLE IV--AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * *

Requirement as to Carriage of Mail

(1) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

* * * * *

TRANSPORTATION OF MAIL

Postal Rules and Regulations

Sec. 405. [72 Stat. 760, 49 U.S.C. 1375] (a) The Postmaster General is authorized to make such rules and regulations, not inconsistent with the provisions of this Act, or any order, rule, or regulation made by the Board thereunder, as may be necessary for the safe and expeditious carriage of mail by aircraft.

* * * * *

Tender of Mail

(d) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for transportation between the points named in such

certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

* * * * *

Evidence of Performance of Mail Service

(g) Air carriers transporting or handling United States mail shall submit, under signature of a duly authorized official, when and in such form as may be required by the Postmaster General, evidence of the performance of mail service; and air carriers transporting or handling mails of foreign countries shall submit, under signature of a duly authorized official, when and in such form as may be required by the Postmaster General, evidence of the amount of such mails transported or handled, and the compensation payable and received therefor.

* * * * *

RATES FOR TRANSPORTATION OF MAIL

Authority to Fix Rates

Sec. 406. [72 Stat. 763, as amended by 76 Stat. 145, 49 U.S.C. 1376] (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same.

Rate Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different

air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Payment

(c) The Postmaster General shall make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section without regard to clause (3) of subsection (b) of this section. The Board shall make payments of the remainder of the total compensation payable under this section out of appropriations made to the Board for that purpose.

* * * * *

TITLE X--PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; Filing of Transcript

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

Power of Court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

* * * * *

Relevant excerpts from the Civil Aeronautics Act of 1938 (52 Stat. 977, 49 U.S.C. 401 et seq., repealed Pub. L. 85-726, 72 Stat. 806, Aug. 23, 1958):

TITLE IV--AIR CARRIER ECONOMIC REGULATION

* * * * *

RATES FOR TRANSPORTATION OF MAIL

Authority to Fix Rates

Sec. 406. [52 Stat. 998, 49 U.S.C. 486] (a) The Authority [Board] is empowered and directed, upon its own initative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by

or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * * *

Relevant excerpts from the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 et sec.):

JUDICIAL REVIEW

Sec. 10. [60 Stat. 243, 5 U.S.C. 1009] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion--

(a) RIGHT OF REVIEW.--Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.--The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.--Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.--Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.--So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity, (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * *

Section 322 of the Transportation Act of 1940 (54 Stat. 955, 49 U.S.C. 66):

(Prior to 1958 amendment)

Sec. 66. Government traffic; payment for transportation; deduction of overpayments

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such

carrier from any amount subsequently found to be due such carrier. Sept. 18, 1940, c. 722, Title III, § 322, 54 Stat. 955.

(After 1958 amendment) 1/

Sec. 66. Government traffic; payment for transportation; deduction of overcharges

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharges by any such carrier from any amount subsequently found to be due such carrier. The term "overcharges" shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of this title: Provided, however, That such deductions shall be made within three years (not including any time of war) from the time of payment of bills: Provided further, That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later. As amended Aug. 26, 1958, Pub. L. 85-762, § 2, 72 Stat. 860.

Relevant excerpts from the Judiciary Code (62 Stat. 869, 28 U.S.C. 1 et seq.):

CHAPTER 91--COURT OF CLAIMS

Sec. 1491. Claims against United States generally

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

1/ Sec. 3 of the amendatory act, Pub. L. 85-762, 72 Stat. 860, provides: "The provision of this Act which amends section 322 of the Transportation Act of 1940 [this section] shall apply only to transportation performed and payment made therefor subsequent to the effective date of this Act [August 26, 1958]."

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort. June 25, 1948, c. 646, 62 Stat. 940.

APPENDIX B

The subsidy mail pay formula set forth in Order E-8181 (J.A. 29-31) may be expressed mathematically as follows:

$$\frac{S}{DMF} \quad \frac{BMF \times \$.6979 - SMF \times \$.0090 \times XLF}{DMF}$$

where S = total subsidy pay for the month
DMF = designated miles flown
SMF = scheduled miles flown (including extra sections)
BMF = base miles flown = scheduled miles flown, but not in excess of an average of 5500 miles per day
XLF = excess load factor = excess, if any, of passenger load factor over 42%

This formula may be restated in a way which will make clear the dependence of subsidy paid on scheduled miles flown and on revenue passenger-miles. As will be seen, "designated miles flown" cancels out of the formula. Furthermore, during every one of the 21 months in question, petitioner flew more than the base mileage of 5500 per day, and its monthly factor exceeded 42% (J.A. 82-83, lines 1 & 7). Consequently:

$$BFM = 5500 \times D \qquad \text{and}$$

$$XLF = \frac{RPM}{ASM} \times 100\% - 42\%$$

where D = number of days in the month
RPM = revenue passenger miles
ASM = available seat miles = 21 x SMF

Substituting in the original formula and simplifying:

$$S = \$3838.45 \times D + SMF \times \$.378 - RPM \times \$.042857$$

This shows that every mile of ferry flight without passengers which is added into "scheduled miles flown" in the formula results in an increase in subsidy of 37.8¢. Adding in 2500 miles of ferry flight per month (which is approximately what petitioner did) increases the subsidy by $945 a month.

Moreover, the above equation shows that any DC-3 flight with fewer than 9 passengers aboard will result in an increased subsidy; if the plane returns empty, and the deadhead mileage is included in scheduled miles flown, there must be 18 paying passengers aboard on the outbound flight (out of a capabity of 21 seats) to avoid an increase in subsidy. Thus, for each 100-mile trip:

One-Way Flight		Round Trip, Return Empty	
Passengers	Added Subsidy	Passengers	Added Subsidy
0	$ 37.80	0	$ 75.60
1	33.51	2	67.03
2	29.23	4	58.46
3	24.94	6	49.89
4	20.66	8	41.31
5	16.37	10	32.74
6	12.09	12	24.17
7	7.80	14	15.60
8	3.51	16	7.03
9	(.77)	18	(1.54)

REPLY BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,986

MOHAWK AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition for Judicial Review Of An Order Of The Civil Aeronautics Board

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TABLE OF CONTENTS

CITATIONS

Cases:

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* Cases chiefly relied upon

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REPLY BRIEF FOR PETITIONER

I. Respondent Attempts to Obscure The Plain Illegality Of Its Retroactive Adjustment To Petitioner's Final Mail Rate By Wrapping That Action In The Mantle Of Administrative Expertise.

Respondent alleges that when it retroactively disallowed certain extra section mileage operated by Petitioner between October 1, 1953, and June 30, 1955, it was interpreting and enforcing Order E-8181 in accordance with its "original intent and meaning". (Respondent's Brief, p. 11). What Respondent fails to explain, however, is how that "original intent and meaning" could be interpreted three different ways before the offset of $18.204.16

actually was made against mail pay otherwise due Petitioner. (Respondent's Brief, pp. 6-7).

Petitioner submits that Respondent was developing a completely new definition of extra section mileage and attempting to apply it retroactively to a past final mail rate period when Respondent first proposed an adjustment to Petitioner's final mail rate on October 25, 1957. (J.A. 40).[1]

Respondent also contends that its new definition of extra section mileage is consistent with its "prior" pronouncements. (Respondent's Brief, p. 22). After developing a "bootstrap" definition of extra sections (Respondent's Brief, pp. 22-23), Respondent attempts to demonstrate that its prior pronouncements necessitated the interpretation of extra section mileage it now seeks to impose. (Respondent's Brief, pp. 24-25). This self-serving effort by Respondent should be rejected by this Court. Petitioner has shown that the Uniform System of Accounts specifically recognized that extra section flights might be designated for a particular traffic purpose and not actually carry that traffic. (Petitioner's Brief, p. 14). As Respondent's own efforts to show otherwise plainly indicate, Respondent's other "prior pronouncements" do not support its position that its new definition of extra section mileage is either in accord with or compelled by those pronouncements. Nor does Respondent's practice of raising arguments not made by Petition-

[1] By letter dated November 7, 1955, after the subject period, Respondent stated: "The Rates Division of the Board has been advised of this exception to your practice for consideration in your mail rate case." (J.A. 33). The language, "your mail rate case", was an obvious reference to the case then in progress and not to the past rate which had been reopened as of June 30, 1955. No *adjustment* to a past final mail rate period was proposed until the letter of October 25, 1957. Two years would seem to be an inordinately long time to interpret an order according to its "original intent and meaning", further suggesting the fact that Respondent actually was developing a *new* definition of extra section mileage.

er and then refuting these hypothetical arguments, establish that its action was not arbitrary, capricious, and an abuse of its discretion especially in view of the variety of alternatives to retroactive action that were available to Respondent. (Petitioner's Brief, pp. 22-23).

This Court need not substitute itself for the mail rate section of Respondent and perform elaborate calculations pursuant to esoteric formulas, as Respondent appears to desire it to do, in order to pass on the illegality of Respondent's action. The legal question here is whether Respondent can recapture subsidy paid to Petitioner under a final mail rate on the basis of a definition of extra section mileage arrived at after the close of the period during which that rate was paid. What rate of return or amount of return Petitioner would, or would not, have received under a different set of circumstances than actually existed would appear to be irrelevant for a resolution of this question.

Nevertheless, for the record, a misconception created by Respondent's attempt to prognosticate what might have happened under different circumstances needs to be corrected. Respondent contends that even if Petitioner's zero load factor extra section flights had been excluded from Petitioner's base year figures, a distinct reduction would have resulted in Petitioner's subsidy, apparently greater than the reduction actually made by Respondent. (Respondent's Brief, p. 36). It is probably sufficient that this contention is refuted by Respondent's letter of May 15, 1963, where it is stated:

> "It is true that if zero load factor miles were mistakenly included in Mohawk's base year figures, exclusion of such miles in the computation of its subsidy payment under the final rate would probably result in less mail pay to Mohawk than if such miles had been excluded from the very beginning." (J.A. 95).

It takes no sophisticated analysis to realize that the effect of Respondent's exclusion of certain zero load factor extra section flights operated by Petitioner is to increase the experienced load factor of Petitioner during the period in question. Indeed, Respondent does not appear to contest this fact. (Respondent's Brief, p. 36). Under the subsidy formula in effect during the period in question, as Petitioner's actual load factors exceeded its base load factor of 42 per cent built into the formula its subsidy was proportionately reduced.[1] Respondent, however, while raising Petitioner's actual load factors has left the base load factor unchanged. Simple equity would dictate that if the experienced load factor is to be increased by the exclusion of zero load factor extra sections then the base load factor similarly should be increased by the exclusion of such flights.

Such chain reaction effects as indicated above demonstrate the wisdom of not permitting piecemeal retroactive adjustments to final mail rates as Respondent has attempted in this instance.

II. Respondent Raises No Contentions in Support of Dismissal Which Have Not Been Considered and Denied Previously By This Court.

Respondent raises no contention in its Brief in support of dismissal which was not presented to this Court in its Motion to Dismiss. The Court denied that Motion. Since no new matter has been presented, the Court should deny finally these flimsy arguments of Respondent regarding the Court's jurisdiction.

Respondent does not deny that it took away a sum of money from Petitioner. If Petitioner had a right to that

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[1] Petitioner's high load factor operations, of which the extra sections were a part, did result in fact in a substantial reduction in subsidy paid to Petitioner from the estimates in Order E-8181. Respondent in Order E-8181 estimated Petitioner's subsidy need for a future year to be $1,166,570. (J.A. 11). In actuality, Petitioner was paid only $818,842.29 in subsidy for the year 1954. (J.A. 82-83).

money, then Respondent's action constitutes a denial of Petitioner's rights. Therefore, this Court, under well-established standards of reviewability of administrative action, has jurisdiction to determine whether Petitioner has such a right. In *Pennsylvania R.R.* v. *United States*, 363 U.S. 202 (1960), where the government argued that a similar order of the Interstate Commerce Commission was an advisory opinion only (the Solicitor General later conceded error on this point), the Supreme Court correctly set forth the law in this area as follows:

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. *Rochester Tel. Corp.* v. *United States*, 307 US 125, 131, 132, 143, 83 L Ed 1147, 1152, 1153, 1159, 59 S Ct 754. The record shows that the Commission order here meets this standard. The Commission found that the Railroad's domestic rates were 'unreasonable' as to 62 shipments. This order is by no means a mere 'advisory opinion', its 'legal consequences' are obvious, for if valid it forecloses the 'right' of the Railroad to recover its domestic rates on those shipments. We have held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission. *El Dorado Oil Works* v. *United States*, 328 US 12, 90 L Ed 1053, 66 S Ct 843.
>
> "For these reasons we conclude that the Railroad was entitled to have this Commission order judicially reviewed." 363 U.S. at 205.

Respondent has advanced no authority which casts doubt upon the validity of the principle that agency action which denies, determines or concludes rights between a party and the agency is reviewable or that review of the May 15 letter is compelled by that principle. The author-

ities cited by Respondent follow that principle, but on the facts they deal with hypothetical situations, advisory opinions and orders asserting jurisdiction.[1]

Respondent reiterates its fallacious contention that there is "no proper record" and that therefore this Court cannot exercise its powers of appellate review (Respondent's Brief, pp. 16-20) in spite of its conflicting assertion that its interpretation of Order E-8181 is not binding upon this Court. (Respondent's Brief, p. 13). If Respondent's interpretation is not binding upon this Court, then the basis upon which that interpretation was reached would appear to be irrelevant. Also, Respondent states that it would reach the same decision even if an additional record were developed. (Respondent's Brief, p. 18).

In any event, Respondent's view of this Court's jurisdiction to review its action is too narrow and formalistic as has been previously demonstrated. (Petitioner's Answer to Respondent's Motion to Dismiss, pp. 14-20). The "letter" from Respondent is an order which sets forth the findings upon which it is based and it has an effect on Petitioner of the most direct sort since money has been recaptured from Petitioner on the basis of it. The potentiality that this Court may determine that certain factual issues need to be resolved before it can reach a decision does not divest it of jurisdiction. This Court has the power to remand the matter to the Board for a resolution of such issues. *United Air Lines* v. *CAB*, 108 U.S. App.D.C. 220, 281 F.2d 53 (1960).

Respondent's assertion that Petitioner's remedy lies in the Court of Claims is symptomatic of Respondent's confusion with regard to this Court's jurisdiction of the matter at issue.[2] In *Pennsylvania R.R.* v. *United States*,

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[1] For a complete discussion of the authorities, see Petitioner's Answer to Respondent's Motion To Dismiss, pp. 5-14. In the interests of brevity that discussion is not repeated here.

[2] Respondent's contention concerning payment of the money involved (Respondent's Brief, pp. 19-20) has *no* relevance to the

(cont. on p. 7)

supra, p. 5, an almost identical issue was presented as the one contested here and it was held that the carrier's proper remedy lay in the statutory review court and not in the Court of Claims. In that case the General Accounting Office offset a sum of money from payments otherwise due the carrier on the grounds that the carrier improperly charged its domestic rates for certain shipments instead of its export rates. There was no question involved as to the reasonableness of the level of either of these rates.[1] In fact, the reasonableness of the domestic rates as generally applied was conceded. The *sole* question was which rates should be applied to the particular shipments, a question different in form, but not in substance, from the one of whether Respondent properly applied the term extra section mileage in Order E-8181. When the carrier sought to recover the offset in the Court of Claims, this question was referred to the Interstate Commerce Commission to determine which rates should have been applied to the shipments. The Supreme Court held that the resulting order of the ICC was properly appealed to the statutory review court and not to the Court of Claims.

In the present case, Respondent made the offset and issued its interpretation of the basis for the offset at the same time. Surely, Petitioner is not required to pursue the empty futility of a suit to recover the offset in the Court of Claims and a reference back by the Court of Claims to Respondent to determine again the basis of the

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(Cont. from p. 6)

jurisdiction of this Court and is premature. Petitioner does not anticipate that Respondent would disregard this Court's mandate if it determined that Respondent illegally withheld the money involved. If Respondent, however, failed to pay the money voluntarily at that time, Petitioner would anticipate little difficulty in recovering the sum in an appropriate action.

[1] *Pennsylvania R.R.* v. *United States*, 199 F.Supp. 586, 587-588 (E.D. Pa. 1961), *reversed*, 315 F.2d 460 (3rd Cir. 1963), *cert. denied*, 375 U.S. 814 (Oct. 14, 1963).

offset, followed by a statutory appeal from that determination to this Court, when Respondent has issued already its interpretation of the basis for the offset and gives no indication of changing it.

Respectfully submitted,

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